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Carnegie Endowment for International Peace

DIVISION OF INTERNATIONAL LAW

Pamphlet No. 20

THE HAGUE CONVENTION (XIII) OF 1907 CONCERNING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR

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THE GIFT OF

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Preface

In view of the very great interest at the present time in the Conventions and signed Declarations of the First and Second Hague Conferences, and particularly because of the need of accurate information as to ratifications of and adhesions to the Conventions and Declarations relating to war, the Endowment has prepared a series of pamphlets in order that the public may learn from reliable sources the status of these international agreements and the extent to which the Powers now at war are bound by their provisions.

The first pamphlet of this series (No. 3 of the pamphlet series of the Division of International Law) contains the respective Tables of Signatures, Ratifications, Adhesions and Reservations of the Conventions and Declarations of the two Conferences. The compilation has been made from official sources, and the tables have been certified as accurate by the Department of State of the United States. In all cases the reservations contained in the *procès-verbaux*, but only referred to in the official tables issued by the International Bureau of the Permanent Court of Arbitration, have been translated and printed in full, with the references to the official reports where their texts appear. Without the complete text of a reservation it is impossible to know to what extent a Power is bound by a Convention or Declaration.

The Conventions and Declarations, as the case may be, of the two Conferences, are printed separately in the succeeding numbers of the pamphlets, accompanied by the respective lists of countries which have (a) *ratified*, or (b) *adhered to*, or (c) *signed but not ratified* them, with the date of the particular action taken. Each Convention or Declaration is followed also by the texts of reservations, as indicated above respecting the pamphlet containing the Tables of Signatures, Ratifications, etc. (No. 3). The English translations of the original French texts of the several Conventions, Declarations and Final Acts of the Conferences reproduce the official translations of the Department of State, except that a few obvious misprints, and an occasional mistranslation, have been corrected. Marginal notes have been added to facilitate reference.

Inasmuch as most of the Conventions and Declarations of the Conferences concerning war contain a clause to the effect that they only bind belligerents which have ratified them, and then only if all the belligerents are contracting Powers, there is appended a list of the countries now at war and the dates of the formal declarations or announcements of the existence of a state of war.

It should be noted that the Conventions and Declarations are not binding prior to the deposit of ratifications at The Hague. The mere signature of these conventional agreements may be regarded as the indication of an intention to ratify them, but creates no legal obligation. Adhesion has the effect of ratification. In this relation it is proper to remark that only the formal agreements of the Conferences—such as the Conventions and the signed Declarations—contemplate ratification. The informal agreements—such as the unsigned Declarations, Resolutions, Recommendations, and *Vœux*—are not signed separately. They are contained in the Final Act, which is an official summary of the proceedings of each Conference, and as such is signed.

A word should be said about the additional protocol to the Convention for an International Prize Court. It was not agreed upon at the Second Hague Conference, but was subsequently negotiated in order to remove objections to the Prize Court Convention. The signatures to it are indicated in the last column of the table of signatures of the Second Conference.

The Conventions and Declarations are numbered as in the Final Acts.

The official published proceedings of the First Conference are referred to in the footnotes as *Procès-verbaux*, those of the Second as *Actes et documents*. The full titles of the publications are respectively: (1) *Conférence internationale de la paix. La Haye, 18 mai–29 juillet, 1899. Ministère des affaires étrangères. Nouvelle édition. La Haye. Martinus Nijhoff, 1907*; (2) *Deuxième conférence internationale de la paix. La Haye, 15 juin–18 octobre, 1907. Actes et documents. Ministère des affaires étrangères. La Haye, imprimerie nationale, 1907.*

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
December 23, 1914.

CONVENTION (XIII) CONCERNING THE RIGHTS AND DUTIES OF
NEUTRAL POWERS IN NAVAL WAR

Signed at The Hague, October 18, 1907

His Majesty the German Emperor, King of Prussia; [etc.] :

With a view to harmonizing the divergent views which, in the event of naval war, are still held on the relations between neutral Powers and belligerent Powers, and to anticipating the difficulties to which such divergence of views might give rise;

Purpose of
Convention.

Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;

Seeing that, in cases not covered by the present Convention, it is expedient to take into consideration the general principles of the law of nations;

Seeing that it is desirable that the Powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them;

Seeing that it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;

Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except in a case where experience has shown the necessity for such change for the protection of the rights of that Power;

Have agreed to observe the following common rules, which can not however modify provisions laid down in existing general treaties, and have appointed as their plenipotentiaries, namely:

Plenipo-
tentiaries.

[Here follow the names of plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

ARTICLE 1

Belligerents
to respect
rights of
neutral Powers.

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

ARTICLE 2

Hostile acts
in neutral
waters
forbidden.

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

ARTICLE 3

Release of
ships captured:
by neutral
Power.

When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

by captor
Government.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

ARTICLE 4

Prize courts
forbidden in
neutral
territory.

A prize court can not be set up by a belligerent on neutral territory or on a vessel in neutral waters.

ARTICLE 5

Use of neutral
ports by
belligerents
forbidden.

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

ARTICLE 6

War supplies
to belligerents
forbidden.

The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.

ARTICLE 7

A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of use to an army or fleet.

Right of
export, etc.,
allowed.

ARTICLE 8

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.

Arming, etc.,
for hostile
use to be
prevented
by neutral.

ARTICLE 9

A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes.

Impartiality to
belligerents.

Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

Prohibitions
allowed.

ARTICLE 10

The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.

Passing
through
neutral
waters
allowed.

ARTICLE 11

A neutral Power may allow belligerent war-ships to employ its licensed pilots.

Pilots.

ARTICLE 12

In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power

Temporary
stay in ports.

for more than twenty-four hours, except in the cases covered by the present Convention.

ARTICLE 13

Departure of
war-ships on
outbreak of
hostilities.

If a Power which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.

ARTICLE 14

Detention by
reason of
damage, etc.

A belligerent war-ship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

Vessels
permitted
to remain.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to war-ships devoted exclusively to religious, scientific, or philanthropic purposes.

ARTICLE 15

Maximum of
war-ships
allowed
in ports.

In the absence of special provisions to the contrary in the legislation of a neutral Power, the maximum number of war-ships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.

ARTICLE 16

Departure
of war-ships
of both
belligerents.

When war-ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

Order of
departure.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

Allowance to
merchant ships.

A belligerent war-ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

ARTICLE 17

In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

Repairs
permitted
war-ships.

ARTICLE 18

Belligerent war-ships may not make use of neutral ports, roadsteads, on territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

Use of neutral
ports, etc., by
war-ships
forbidden.

ARTICLE 19

Belligerent war-ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Revictualing
permitted.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

Fuel.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

Time for
coaling.

ARTICLE 20

Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.

Restriction
on recoaling.

ARTICLE 21

A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

When prizes
may enter
neutral ports.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Duration
of stay.

ARTICLE 22

Release
of prizes.

A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

ARTICLE 23

Sequestration
of prizes.

A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

Prize crews.

If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.

ARTICLE 24

Detention of
war-ships
refusing
to leave.

If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

Officers
and crew.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

Disposition.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

Officers
paroled.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

ARTICLE 25

Surveillance of
neutral Powers.

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

ARTICLE 26

The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the articles relating thereto.

Exercise of
neutral rights
not an un-
friendly act.

ARTICLE 27

The contracting Powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent war-ships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other contracting Powers.

Promulgation
of laws, etc.,
in force.

ARTICLE 28

The provisions of the present Convention do not apply except to the contracting Powers, and then only if all the belligerents are parties to the Convention.

Contracting
Powers
only affected.

ARTICLE 29

The present Convention shall be ratified as soon as possible.

Ratification.

The ratifications shall be deposited at The Hague.

Deposit at
The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the Powers which take part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the ratifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be at once sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

Certified copies
to Powers.

ARTICLE 30

Adhesion of
non-signatory
Powers.
Notification
of intent.

Non-signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

Communication
to other
Powers.

That Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 31

Effect of
ratification.

The present Convention shall come into force in the case of the Powers which were a party to the first deposit of the ratifications, sixty days after the date of the *procès-verbal* of that deposit, and, in the case of the Powers who ratify subsequently or who adhere, sixty days after the notification of their ratification or of their decision has been received by the Netherland Government.

ARTICLE 32

Denunciation.

In the event of one of the contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherland Government, who shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

Notifying
Power only
affected.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has been made to the Netherland Government.

ARTICLE 33

Register.

A register kept by the Netherland Ministry for Foreign Affairs shall give the date of the deposit of ratifications made by Article 29, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 30, paragraph 2) or of denunciation (Article 32, paragraph 1) have been received.

Each contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.

Signing.

In faith whereof the plenipotentiaries have appended their signatures to the present Convention.

Deposit
of original.

Done at The Hague, the 18th October, 1907, in a single copy, which

shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers which have been invited to the Second Peace Conference.

Certified copies
to Powers.

[Here follow signatures.]

RATIFICATIONS, ADHESIONS AND RESERVATIONS

The foregoing Convention was *ratified* by the following signatory Powers on the dates indicated:

Austria-Hungary	November 27, 1909
Belgium	August 8, 1910
Brazil	January 5, 1914
Denmark	November 27, 1909
France	October 7, 1910
Germany	November 27, 1909
Guatemala	March 15, 1911
Haiti	February 2, 1910
Japan	December 13, 1911
Luxemburg	September 5, 1912
Mexico	November 27, 1909
Netherlands	November 27, 1909
Norway	September 19, 1910
Panama	September 11, 1911
Portugal	April 13, 1911
Roumania	March 1, 1912
Russia	November 27, 1909
Salvador	November 27, 1909
Siam	March 12, 1910
Sweden	November 27, 1909
Switzerland	May 12, 1910

Adhesions:

China	January 15, 1910
Liberia	February 4, 1914
Nicaragua	December 16, 1909
United States	December 3, 1909

The following Powers signed the Convention but have not yet ratified:

Argentine Republic	Italy
Bolivia	Montenegro
Bulgaria	Paraguay
Chile	Persia
Colombia	Peru
Dominican Republic	Servia
Ecuador	Turkey
Great Britain	Uruguay
Greece	Venezuela

*Reservations:*¹

China

Adhesion with reservation of paragraph 2 of Article 14, paragraph 3 of Article 19, and of Article 27.

Dominican Republic

With reservation regarding Article 12.

Germany

Under reservation of Articles 11, 12, 13 and 20.²

Great Britain

Under reservation of Articles 19 and 23.

Japan

With reservation of Articles 19 and 23.²

Persia

Under reservation of Articles 12, 19 and 21.

Siam

Under reservation of Articles 12, 19 and 23.²

Turkey

Under reservation of the declaration concerning Article 10 contained in the *procès-verbal* of the eighth plenary session of the Conference held on October 9, 1907.

¹All these reservations, except those of China and the United States, were made at signature.

²Reservation maintained at ratification.

Extract from the procès-verbal:

The Ottoman delegation declares that the straits of the Dardanelles and the Bosphorus can not in any case be referred to by Article 10. The Imperial Government could undertake no engagement whatever tending to limit its undoubted rights over these straits.¹

United States

The act of adhesion contains the following reservation:

That the United States adheres to the said Convention, subject to the reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.

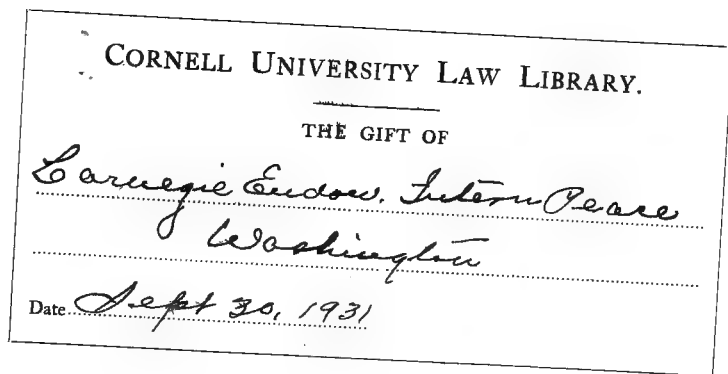
¹Statement of Turkhan Pasha. *Actes et documents*, vol. i, p. 285.

Carnegie Endowment for International Peace

DIVISION OF INTERNATIONAL LAW

Pamphlet No. 21

THE GENEVA CONVENTION OF 1906 FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD



PUBLISHED BY THE ENDOWMENT
WASHINGTON, D. C.

1916

1326713.

Preface

The present pamphlet, dealing with the Geneva Convention of 1906 for the amelioration of the condition of the wounded in armies in the field, is issued by the Division of International Law of the Endowment in continuation of the series of pamphlets of the Conventions signed at The Hague in 1899 and 1907. As was stated in the prefaces of the earlier pamphlets, the great interest at the present time attaching to international agreements relating to the conduct of warfare, and the need for accurate information as to the ratifications of and adhesions and reservations to these agreements, have led the Endowment to prepare the series in order that the public may learn, from reliable and easily accessible sources, the status of the Conventions and the extent to which the Powers now at war are bound by their provisions.

Through the courtesy of his Excellency, Doctor Paul Ritter, the Swiss Minister Plenipotentiary at this Capital, the Endowment has received precise and complete information as to the dates of the ratifications and adhesions appearing on pages 13 and 14 from the Political Department of the Swiss Government, to which were submitted proof-sheets for its comment. In this connection it will be observed that in the cases of some ratifications, two dates are given; the explanation being that since there might, in the view of the Swiss Government, be some doubt as to which date should be accepted for the deposit when the instrument of ratification is forwarded by post to the Swiss Federal Council, and as a result the date of mailing by the ratifying State and the date of the receipt of the document by the Swiss Federal Council are not the same, the Swiss Government has in such cases put both dates upon the record of delivery.

The English translation of the original French text of the Convention and the final protocol of the conference which prepared it reproduces the official translation of the Department of State, except that an occasional mistranslation or typographical error has been corrected.

The Geneva Convention of 1906 is, as stated in the preamble thereof, a revision of the original Red Cross Convention concluded at Geneva August 22, 1864. The conference which drafted the Convention of 1864 was official in nature and, although only representatives of Baden, Belgium, Denmark, France, Hesse, Italy, the Netherlands, Portugal,

Prussia, Spain, Switzerland, and Württemberg, signed the Convention resulting from its labors, nearly every other sovereign State subsequently acceded to it, so that it became undoubted international law. The conference itself was due to the untiring efforts and perseverance of two high-minded Swiss gentlemen, Henri Dunant and Gustave Moynier. In 1868 a second official conference met at Geneva and drafted the so-called additional articles, that is to say, articles to be added to the original Convention of 1864, of which Articles 6 to 14 apply to maritime warfare. The so-called additional articles were not ratified. They served, however, as the basis of the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, drafted at the First Hague Peace Conference in 1899. The Hague Conference also recommended that the original Convention of 1864 concerning the wounded in war on land should be revised, and that because of the Swiss initiative this should be done under the auspices of Switzerland. As a result, Switzerland called a conference, which met at Geneva in 1906 and drafted the Convention printed in this pamphlet.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
February 5, 1916.

**CONVENTION FOR THE AMELIORATION OF THE CONDITION OF
THE WOUNDED IN ARMIES IN THE FIELD**

Signed at Geneva, July 6, 1906

His Majesty the German Emperor, King of Prussia; His Excellency the President of the Argentine Republic; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of the Belgians; His Royal Highness the Prince of Bulgaria; His Excellency the President of the Republic of Chile; His Majesty the Emperor of China; His Majesty the King of the Belgians, Sovereign of the Kongo Free State; His Majesty the Emperor of Korea¹; His Majesty the King of Denmark; His Majesty the King of Spain; the President of the United States of America; the President of the United States of Brazil; the President of the United Mexican States; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland, Emperor of India; His Majesty the King of the Hellenes; the President of the Republic of Guatemala; the President of the Republic of Honduras; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Royal Highness the Grand Duke of Luxemburg, Duke of Nassau; His Highness the Prince of Montenegro; His Majesty the King of Norway; Her Majesty the Queen of the Netherlands; the President of the Republic of Peru; His Imperial Majesty the Shah of Persia; His Majesty the King of Portugal and of the Algarves, etc., His Majesty the King of Roumania; His Majesty the Emperor of All the Russias; His Majesty the King of Serbia; His Majesty the King of Siam; His Majesty the King of Sweden; the Swiss Federal Council; the President of the Oriental Republic of Uruguay,

Contracting
Parties.

Being equally animated by the desire to lessen the inherent evils of warfare as far as is within their power, and wishing for this purpose to improve and supplement the provisions agreed upon at Geneva

Scope of
Convention.

¹See footnote, p. 14.

on August 22, 1864, for the amelioration of the condition of the wounded in armies in the field,

Have decided to conclude a new convention to that effect, and have appointed as their plenipotentiaries, to wit:

Plenipo-
tentiaries.

His Majesty the German Emperor, King of Prussia: His Excellency the Chamberlain and actual Privy Councilor A. von Bülow, Envoy Extraordinary and Minister Plenipotentiary at Berne, General of Brigade Baron von Manteuffel, Medical Inspector and Surgeon General Dr. Villaret (with rank of general of brigade), Dr. Zorn, Privy Councilor of Justice, ordinary professor of law at the University of Bonn, Solicitor of the Crown;

His Excellency the President of the Argentine Republic: His Excellency Mr. Enrique B. Moreno, Envoy Extraordinary and Minister Plenipotentiary at Berne, Mr. Molina Salas, Consul General in Switzerland;

His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary: His Excellency Baron Heidler von Eger-egg and Syrgenstein, actual Privy Councilor, Envoy Extraordinary and Minister Plenipotentiary at Berne;

His Majesty the King of the Belgians: Colonel of Staff Count de T'Serclaes, Chief of Staff of the Fourth Military District;

His Royal Highness the Prince of Bulgaria: Dr. Marin Rousseff, Chief Medical Officer, Captain of Staff Boris Sirmanoff;

His Excellency the President of the Republic of Chile: Mr. Augustin Edwards, Envoy Extraordinary and Minister Plenipotentiary;

His Majesty the Emperor of China: His Excellency Mr. Lou Tseng Tsiang, Envoy Extraordinary and Minister Plenipotentiary to The Hague;

His Majesty the King of the Belgians, Sovereign of the Kongo Free State: Colonel of Staff Count de T'Serclaes, Chief of Staff of the Fourth Military District of Belgium;

His Majesty the Emperor of Korea¹; His Excellency Mr. Tsunetada Kato, Envoy Extraordinary and Minister Plenipotentiary of Japan to Brussels;

His Majesty the King of Denmark: Mr. Laub, Surgeon General, Chief of the Medical Corps of the Army;

¹See footnote, p. 14.

His Majesty the King of Spain: His Excellency Mr. Silverio de Baguer y Corsi, Count of Baguer, Minister Resident;

The President of the United States of America: Mr. William Cary Sanger, former Assistant Secretary of War of the United States of America, Vice-Admiral Charles S. Sperry, president of the Naval War College, Brigadier General George B. Davis, Judge Advocate General of the Army, Brigadier General Robert M. O'Reilly, Surgeon General of the Army;

The President of the United States of Brazil: Dr. Carlos Lemgruber Kropf, Chargé d'Affaires at Berne, Colonel of Engineers Roberto Trompowski Leitão d'Almeida, Military Attaché to the Brazilian Legation at Berne;

The President of the United Mexican States: General of Brigade José Maria Perez;

The President of the French Republic: His Excellency Mr. Révoil, Ambassador to Berne, Mr. Louis Renault, member of the Institute of France, Minister Plenipotentiary, Jurisconsult of the Ministry of Foreign Affairs, professor in the Faculty of Law at Paris, Colonel Olivier of Reserve Artillery, Chief Surgeon Pauzat of the Second Class;

His Majesty the King of the United Kingdom of Great Britain and Ireland, Emperor of India: Major General Sir John Charles Ardagh, K. C. M. G., K. C. L. E., C. B., Professor Thomas Erskine Holland, K. C., D. C. L., Sir John Furley, C. B., Lieutenant Colonel William Grant Macpherson, C. M. G., R. A. M. C.;

His Majesty the King of the Hellenes: Mr. Michel Kebedgy, professor of international law at the University of Berne;

The President of the Republic of Guatemala: Mr. Manuel Arroyo, Chargé d'Affaires at Paris, Mr. Henri Wiswald, Consul General to Berne, residing at Geneva;

The President of the Republic of Honduras: Mr. Oscar Höepfl, Consul General to Berne;

His Majesty the King of Italy: Marquis Roger Maurigi di Castel Maurigi, Colonel in His Army, Grand Officer of His Royal Order of St. Maurice and St. Lazarus, Major General Giovanni Randone, Military Medical Inspector, Commander of His Royal Order of the Crown of Italy;

His Majesty the Emperor of Japan: His Excellency Mr. Tsunetada Kato, Envoy Extraordinary and Minister Plenipotentiary to Brussels;

His Royal Highness the Grand Duke of Luxemburg, Duke of Nassau: Staff Colonel Count de T'Serclaes, Chief of Staff of the Fourth Military District of Belgium;

His Highness the Prince of Montenegro: Mr. E. Odier, Envoy Extraordinary and Minister Plenipotentiary of the Swiss Confederation in Russia, Colonel Mürset, Chief Surgeon of the Swiss Federal Army;

His Majesty the King of Norway: Captain Daae, of the Medical Corps of the Norwegian Army;

Her Majesty the Queen of the Netherlands: Lieutenant General (retired) Jonkheer J. C. C. den Beer Poortugael, member of the Council of State, Colonel A. A. J. Quanjier, Chief Medical Officer, First Class;

The President of the Republic of Peru: Mr. Gustavo de la Fuente, First Secretary of the Legation of Peru at Paris;

His Imperial Majesty the Shah of Persia: His Excellency Mr. Samad Khan Momtaz-os-Saltaneh, Envoy Extraordinary and Minister Plenipotentiary at Paris;

His Majesty the King of Portugal and of the Algarves, etc.: His Excellency Mr. Alberto d'Oliveira, Envoy Extraordinary and Minister Plenipotentiary at Berne; Mr. José Nicolau Raposo-Botelho, Colonel of Infantry, former Deputy, superintendent of the Royal Military College at Lisbon;

His Majesty the King of Roumania: Dr. Satche Stephanesco, Colonel of Reserve;

His Majesty the Emperor of All the Russias: His Excellency Privy Councilor Martens, permanent member of the Council of the Ministry of Foreign Affairs of Russia;

His Majesty the King of Serbia: Mr. Milan St. Markovitch, Secretary General of the Ministry of Justice, Colonel Dr. Sondermayer, Chief of the Medical Division of the War Ministry;

His Majesty the King of Siam: Prince Charoon, Chargé d'Affaires at Paris, Mr. Corragioni d'Orelli, Counselor of Legation at Paris;

His Majesty the King of Sweden: Mr. Sörensen, Chief Surgeon of the Second Division of the Army;

The Swiss Federal Council: Mr. E. Odier, Envoy Extraordinary and Minister Plenipotentiary in Russia, Colonel Mürset, Chief Surgeon of the Federal Army;

The President of the Oriental Republic of Uruguay: Mr. Alexandre Herosa, Chargé d'Affaires at Paris,

Who, after having communicated to each other their full powers, found in good and due form, have agreed on the following:

CHAPTER I.—*The Sick and Wounded*

ARTICLE 1

Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.

Treatment
of wounded,
etc., prisoners.

A belligerent, however, when compelled to leave his sick or wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and matériel of his sanitary service to assist in caring for them.

Wounded left
in the hands of
an adversary.

ARTICLE 2

Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners become applicable to them.

To be con-
sidered prison-
ers of war.

The belligerents remain free, however, to mutually agree upon such clauses, by way of exception or favor, in relation to the wounded or sick as they may deem proper. They shall especially have authority to agree—

Belligerents
may agree:

1. To mutually return the sick and wounded left on the field of battle after an engagement.

To mutually
return sick
and wounded.

2. To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners.

To send home
those who
have recovered.

3. To send the sick and wounded of the enemy to a neutral State, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities.

To send sick,
etc., to
neutral State.

ARTICLE 3

Protection from
robbery, etc.

After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from robbery and ill-treatment.

He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration.

ARTICLE 4

Disposal of
identification
papers, etc.

As soon as possible each belligerent shall forward to the authorities of their country or army the marks or military papers of identification found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him.

Notifications
of intern-
ments, etc.

Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country.

ARTICLE 5

Appeal to
charity of
inhabitants.

Military authority may make an appeal to the charitable zeal of the inhabitants to receive and, under its supervision, to care for the sick and wounded of the armies, granting to persons responding to such appeals special protection and certain immunities.

CHAPTER II.—*Sanitary Formations and Establishments*

ARTICLE 6

Protection
to sanitary
establishments.

Mobile sanitary formations (*i. e.*, those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.

ARTICLE 7

Exceptions.

The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy.

ARTICLE 8

A sanitary formation or establishment shall not be deprived of the protection accorded by Article 6 by the fact—

Rights to protection not affected.

1. That the personnel of a formation or establishment is armed and uses its arms in self-defense or in defense of its sick and wounded.

Defense of wounded, etc., allowed.

2. That in the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels acting under competent orders.

Armed guards permitted.

3. That arms or cartridges, taken from the wounded and not yet turned over to the proper authorities, are found in the formation or establishment.

Undelivered arms, etc., of wounded.

CHAPTER III.—*Personnel*

ARTICLE 9

The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

Protection to the personnel of sanitary formations.

These provisions apply to the guards of sanitary formations and establishments in the case provided for in section 2 of Article 8.

Guards included.

ARTICLE 10

The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.

Protection to the personnel of volunteer aid societies.

Each State shall make known to the other, either in time of peace or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

Notification before actual employment.

ARTICLE 11

Services of
sanitary per-
sonnel of a
neutral State
restricted.

Notice
to enemy.

A recognized society of a neutral State can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.

ARTICLE 12

Continuance
of service
after capture.

To be returned
to their
own country.

Persons described in Articles 9, 10, and 11 will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power.

When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms, and horses as are their private property.

ARTICLE 13

Pay and
allowance.

While they remain in his power, the enemy will secure to the personnel mentioned in Article 9 the same pay and allowances to which persons of the same grade in his own army are entitled.

CHAPTER IV.—*Matériel*

ARTICLE 14

Use and resti-
tution of cap-
tured matériel.

If mobile sanitary formations fall into the power of the enemy, they shall retain their matériel, including the teams, whatever may be the means of transportation and the conducting personnel. Competent military authority, however, shall have the right to employ it in caring for the sick and wounded. The restitution of the matériel shall take place in accordance with the conditions prescribed for the sanitary personnel, and, as far as possible, at the same time.

ARTICLE 15

Use of buildings,
etc., of fixed
establishments
restricted.

Buildings and matériel pertaining to fixed establishments shall remain subject to the laws of war, but can not be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them, in case of

important military necessity, if, before such use, the sick and wounded who are in them have been provided for.

ARTICLE 16

The matériel of aid societies admitted to the benefits of this convention, in conformity to the conditions therein established, is regarded as private property, and, as such, will be respected under all circumstances, save that it is subject to the recognized right of requisition by belligerents in conformity to the laws and usages of war.

Matériel of aid societies regarded as private property.

CHAPTER V.—*Convoys of Evacuation*

ARTICLE 17

Convoys of evacuation shall be treated as mobile sanitary formations subject to the following special provisions:

Convoys of evacuation.

1. A belligerent intercepting a convoy may, if required by military necessity, break up such convoy, charging himself with the care of the sick and wounded whom it contains.

Treatment of intercepted convoys.

2. In this case the obligation to return the sanitary personnel, as provided for in Article 12, shall be extended to include the entire military personnel employed, under competent orders, in the transportation and protection of the convoy.

Return of military personnel employed.

The obligation to return the sanitary matériel, as provided for in Article 14, shall apply to railway trains and vessels intended for interior navigation which have been especially equipped for evacuation purposes, as well as to the ordinary vehicles, trains, and vessels which belong to the sanitary service.

Railway trains, etc.

Military vehicles, with their teams, other than those belonging to the sanitary service, may be captured.

Military vehicles, etc., may be captured.

The civil personnel and the various means of transportation obtained by requisition, including railway matériel and vessels utilized for convoys, are subject to the general rules of international law.

Civil personnel, etc.

CHAPTER VI.—*Distinctive Emblem*

ARTICLE 18¹

Out of respect to Switzerland the heraldic emblem of the red cross on a white ground, formed by the reversal of the federal colors, is

Distinctive emblem of sanitary service.

¹See reservations of Persia and Turkey, *post*, p. 15.

continued as the emblem and distinctive sign of the sanitary service of armies.

ARTICLE 19

Used by permission of military authority.

This emblem appears on flags and brassards as well as upon all matériel appertaining to the sanitary service, with the permission of the competent military authority.

ARTICLE 20

Use of the brassard.

The personnel protected in virtue of the first paragraph of Article 9, and Articles 10 and 11, will wear attached to the left arm a brassard bearing a red cross on a white ground, which will be issued and stamped by competent military authority, and accompanied by a certificate of identity in the case of persons attached to the sanitary service of armies who do not have military uniform.

ARTICLE 21

Display of Red Cross flag restricted.

The distinctive flag of the Convention can only be displayed over the sanitary formations and establishments which the Convention provides shall be respected, and with the consent of the military authorities. It shall be accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.

Sanitary formations which have fallen into the power of the enemy, however, shall fly no other flag than that of the Red Cross so long as they continue in that situation.

ARTICLE 22

Use of flag by sanitary formations of neutrals.

The sanitary formations of neutral countries which, under the conditions set forth in Article 11, have been authorized to render their services, shall fly, with the flag of the Convention, the national flag of the belligerent to which they are attached. The provisions of the second paragraph of the preceding article are applicable to them.

ARTICLE 23

Use of distinctive emblem in time of war and peace.

The emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may only be used, whether in time of peace or war, to protect or designate sanitary formations and establishments, the personnel and matériel protected by the Convention.

CHAPTER VII.—*Application and Execution of the Convention*

ARTICLE 24

The provisions of the present Convention are obligatory only on the contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention.

Provisions obligatory only on contracting Powers.

ARTICLE 25

It shall be the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective governments, and conformably to the general principles of this Convention.

Details of execution of Convention.

ARTICLE 26

The signatory Governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this Convention and to make them known to the people at large.

Notice to troops, etc.

CHAPTER VIII.—*Repression of Abuses and Infractions*

ARTICLE 27

The signatory Powers whose legislation may not now be adequate engage to take or recommend to their legislatures such measures as may be necessary to prevent the use, by private persons or by societies other than those upon which this Convention confers the right thereto, of the emblem or name of the Red Cross or Geneva Cross, particularly for commercial purposes by means of trade-marks or commercial labels.

Legislation to prevent improper use of emblem, etc.

The prohibition of the use of the emblem or name in question shall take effect from the time set in each act of legislation, and at the latest five years after this Convention goes into effect. After such going into effect, it shall be unlawful to use a trade-mark or commercial label contrary to such prohibition.

Effect.

ARTICLE 28

In the event of their military penal laws being insufficient, the signatory Governments also engage to take, or to recommend to their

Repression, in time of war, of robbery, etc.

legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill-treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrong use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present Convention.

Notification
of repressive
measures.

They will communicate to each other through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the ratification of the present Convention.

General Provisions

ARTICLE 29

Ratification and
deposit of
original.

The present Convention shall be ratified as soon as possible. The ratifications will be deposited at Berne.

Certified copies
to Powers.

A record of the deposit of each act of ratification shall be prepared, of which a duly certified copy shall be sent, through diplomatic channels, to each of the contracting Powers.

ARTICLE 30

Operative*
six months after
date of deposit.

The present Convention shall become operative, as to each Power, six months after the date of deposit of its ratification.

ARTICLE 31

Convention
of August
22, 1864,
superseded.

The present Convention, when duly ratified, shall supersede the Convention of August 22, 1864, in the relations between the contracting States.

Exception.

The Convention of 1864 remains in force in the relations between the parties who signed it but who may not also ratify the present Convention.

ARTICLE 32

What Powers
may sign.

The present Convention may, until December 31, proximo, be signed by the Powers represented at the Conference which opened at Geneva on June 11, 1906, as well as by the Powers not represented at the Conference who have signed the Convention of 1864.

Extension of
date for
signatures.

Such of these Powers as shall not have signed the present Convention on or before December 31, 1906, will remain at liberty to accede to it after that date. They shall signify their adherence in a written

notification addressed to the Swiss Federal Council, and communicated to all the contracting Powers by the said Council.

Other Powers may request to adhere in the same manner, but their request shall only be effective if, within the period of one year from its notification to the Federal Council, such Council has not been advised of any opposition on the part of any of the contracting Powers.

Adhesion of
other Powers.

ARTICLE 33

Each of the contracting Parties shall have the right to denounce the present Convention. This denunciation shall only become operative one year after a notification in writing shall have been made to the Swiss Federal Council, which shall forthwith communicate such notification to all the other contracting parties.

Denunciation.

This denunciation shall only become operative in respect to the Power which has given it.

In faith whereof the plenipotentiaries have signed the present Convention and affixed their seals thereto.

Signing.

Done at Geneva, the sixth day of July, one thousand nine hundred and six, in a single copy, which shall remain in the archives of the Swiss Confederation and certified copies of which shall be delivered to the contracting Parties through diplomatic channels.

Deposit
of original.

Certified copies
to Powers.

[Here follow signatures.]

RATIFICATIONS, ADHESIONS AND RESERVATIONS

The foregoing Convention was *ratified* by the following signatory Powers on the dates indicated:¹

Austria-Hungary	March 27, 1908
Belgium	August 27, 1907
Brazil	June 18, 1907
Bulgaria	May 30/June 3, 1912
Chile	September 6, 1909
Denmark	June 11, 1907
France	July 19, 1913
Germany	May 27, 1907
Great Britain	April 16, 1907
Guatemala	March 25/26, 1912
Honduras	November 27, 1911

¹Where two dates are given, the first is the date of mailing by the ratifying State, and the second that of receipt of the document by the Swiss Federal Council.

Italy	March 9, 1907
Japan	April 23, 1908
Kongo	April 16, 1907
Luxemburg	August 27, 1907
Mexico	June 4, 1907
Netherlands	July 31, 1908
Norway	November 24/29, 1909
Portugal	July 12, 1911
Roumania	August 3, 1911
Russia	February 9, 1907
Serbia	September 17/October 9, 1909
Siam	January 29, 1907
Spain	October 11, 1907
Sweden	July 11/13, 1911
Switzerland	April 16, 1907
United States	February 9, 1907

Adhesions:

Colombia	October 28, 1907
Costa Rica	July 29, 1910
Cuba	March 17, 1908
Nicaragua	June 17, 1907
Paraguay	December 4, 1909
Salvador	September 28, 1911
Turkey	August 24, 1907
Venezuela	July 8, 1907

The following Powers signed the Convention but have not yet ratified:

Argentine Republic	Montenegro
China	Persia
Greece	Peru
Korea ¹	Uruguay

¹By a Declaration dated October 15, 1906, the Japanese Chargé d'Affaires at Berne stated that, in virtue of the Agreement between Japan and Korea of November 17, 1905, the Imperial Japanese Government has the right of entirely controlling the foreign relations and affairs of Korea. Consequently the inclusion of Korea in the preamble of the Convention and the signature of the latter by the Japanese plenipotentiary on behalf of Korea as a separate contracting Party, being erroneous and incompatible with the aforesaid arrangement, are considered by the Japanese Government as null and void.

Reservations:

Great Britain

With reservation of Articles 23, 27 and 28.¹

Persia

With reservation of Article 18.²

Turkey

With the reservation that their armies will make use of the emblem of the red crescent for the protection of their ambulances.³

Japan and Korea, and China

[From the official minutes⁴ of the meeting of July 5, 1906, it appears that reservations, not referred to in the convention document itself, were made by Japan and Korea as to Article 28, and by China as to Articles 27 and 28.]

Extract from the procès-verbal:

Mr. Kato made the following declaration: The Japanese Government is not at present disposed to engage itself to prepare a military penal law in application of Article 28 of the Convention. It therefore makes a reservation on the subject of that provision.⁵

Mr. Lou Tseng-tsiang read the following declaration: The Government of Peking being now occupied with a revision of the legislation of the Empire, it would find it very difficult, before completing that work, to prepare new laws. Therefore I believe that I ought to declare here that I shall sign the new Convention under reservation of Articles 27 and 28, while hoping that our revised legislation will subsequently and in good time be completed by the addition of a new prohibitory law in conformity with the spirit of the above-mentioned clauses.

¹Reservation made at signature. A declaration withdrawing this reservation was signed at Berne, July 7, 1914.

²Reservation made at signature. In place of the Red Cross on a white field, Persia substitutes the Red Lion with the Red Sun on a white field as the emblem of its military sanitary service.

³Reservation contained in the act of adhesion.

⁴*Actes de la conférence de revision réunie à Genève du 11 juin au 6 juillet 1906* (Geneva, 1906), p. 238.

⁵This reservation was withdrawn by Japan in the instrument of ratification.

FINAL PROTOCOL OF THE CONFERENCE FOR THE REVISION OF THE GENEVA CONVENTION

Signed at Geneva, July 6, 1906

Convocation
of conference.

The Conference called by the Swiss Federal Council, with a view to revising the international Convention of August 22, 1864, for the amelioration of the condition of soldiers wounded in armies in the field, met at Geneva on June 11, 1906. The Powers hereinbelow enumerated took part in the Conference to which they had designated the delegates hereinbelow named.

Countries
and delegates.

[Here follow the names of countries and delegates.]

Convention
framed.

In a series of meetings held from the 11th of June to the 5th of July, 1906, the Conference discussed and framed, for the signatures of the plenipotentiaries, the text of a Convention which will bear the date of July 6, 1906.

Resolution that
differences as
to interpreta-
tion be referred
to the Perma-
nent Court of
Arbitration
at The Hague.

In addition, and conformably to Article 16 of the Convention for the peaceful settlement of international disputes, of July 29, 1899, which recognized arbitration as the most effective and at the same time, most equitable means of adjusting differences that have not been resolved through the diplomatic channel, the Conference uttered the following *vœu*:

The Conference expresses the wish that, in order to arrive at as exact as possible an interpretation and application of the Geneva Convention, the contracting Powers will refer to the Permanent Court at The Hague, if permitted by the cases and circumstances, such differences as may arise among them, in time of peace, concerning the interpretation of the said Convention.

Adopting
States.

This *vœu* was adopted by the following States:

Germany, Argentine Republic, Austria-Hungary, Belgium, Bulgaria, Chile, China, Kongo, Denmark, Spain (*ad referendum*), United States of America, Brazil, France, Greece, Guatemala, Honduras, Italy, Luxemburg, Montenegro, Nicaragua, Norway, the Netherlands, Peru,

Persia, Portugal, Roumania, Russia, Serbia, Siam, Sweden, Switzerland and Uruguay.

The *varu* was rejected by the following States:

Rejecting
States.

Korea, Great Britain and Japan.

Signing.

In witness whereof the delegates have signed the present Protocol.

Deposit
of original.

Done at Geneva, the sixth day of July, one thousand nine hundred and six, in a single copy which shall be deposited in the archives of the Swiss Confederation and certified copies of which shall be delivered to all the Powers represented at the Conference.

Certified copies
to Powers.

[Here follow signatures.]



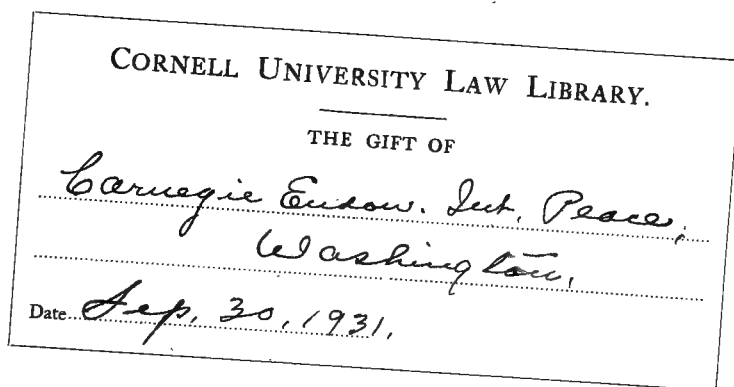
Carnegie Endowment for International Peace

DIVISION OF INTERNATIONAL LAW

Pamphlet No. 22

DOCUMENTS RESPECTING THE LIMITATION OF ARMAMENTS

Laid before the First Hague Peace Conference of 1899
by the Government of the Netherlands



PUBLISHED BY THE ENDOWMENT
WASHINGTON, D. C.

1916

B 267 ⁴/₁₄



Preface

The Netherland Government in 1899, at the time of the assembling of the First Peace Conference at The Hague, prepared and laid before that conference a collection of official documents and extracts from writers of authority relating to the various questions that had been proposed for discussion by the Russian Government. This collection, as published, is entitled *Actes et documents relatifs au programme de la conférence de la paix publiés d'ordre du gouvernement par Jhr. van Daehne van Varick* (The Hague, Martinus Nijhoff, 1899).

That part of the volume which relates to the subject of the limitation of armaments is now issued in English translation by the Division of International Law of the Carnegie Endowment for International Peace in the present pamphlet, in pursuance of the policy of the Trustees to disseminate information of this nature and of the specific direction of the Executive Committee in regard to the above-mentioned documents.

The footnotes of the original have been enlarged by adding biographical and bibliographical data.

It will be observed that the Rush-Bagot agreement between Great Britain and the United States for the limitation of armament upon the Great Lakes of North America was not included among the documents submitted by the Netherland Government to the Hague Peace Conference. As the present publication consists solely of the documents dealing with limitation of armaments laid before the Conference, it was not deemed advisable to insert it although a reference to it appears in one of the official documents so submitted. The reader interested in this agreement can find it in any collection of treaties of the United States and most conveniently perhaps in the second of the present series of pamphlets, entitled *Limitation of Armament on the Great Lakes*, and containing the report made in 1892 by the Honorable John W. Foster, Secretary of State of the United States.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
February 10, 1916.

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1. MEMORANDUM OF PRINCE METTERNICH¹

One question which had occupied the attention of the Governments of Russia and Austria since the Congress of Vienna was that of disarmament, which was raised by the Prince Regent of England. The latter's idea was that an international conference, composed of men of military training, acting under full powers from the great nations of Europe, should determine the normal basis in times of peace for the armies of each Power. The Russian Government welcomed this proposition of England in a very sympathetic spirit and at the same time expressed the desire that a "natural status of peace" among European nations should also be fixed "in the future congress."

Emperor Alexander I wrote to Lord Castlereagh on March 21, 1816:

It is necessary that this disarmament be effected with the same agreement and striking loyalty that has decided the safety of Europe and which alone can to-day insure its happiness.

As for Austria, it took the plan under serious consideration, being the more strongly led to do so because its finances were in a deplorable condition. Prince Metternich announced at this time in a special *Memorandum*, his opinion on the *establishment of standing armies in general*. From the point of view of domestic order, standing armies certainly formed an indispensable aid to governments. But, continued the prince, it would be an error to consider them as the *sole*, or the surest support of governments. "The real strength of princes is more truly found in their system of government and the principles upon which they base their administration, in a word, in what forms a real moral force, than in a great array of military strength."

A very large army presents a considerable danger even when maintained for preserving domestic order of a State, because it exhausts resources which are indispensable for a wise administration of the people. This danger is particularly great at the present time (1816), when armies themselves are imbued with revolutionary ideas and given up to aspirations which can not be realized without overturning the existing order of public affairs. Passing then to an examination of this question from the point of view of foreign policy, the Austrian Chan-

¹Cf. Martens, *Recueil des traités et conventions conclus par la Russie avec les Puissances étrangères*, vol. iv, p. 36; vol. xi, p. 258.

Prince Metternich (1773-1859), Austrian diplomat and statesman.

cellor sees no further use for enormous armies at a time when the Great Powers of Europe have definitively fixed their territorial limits by common agreement, and do not desire to enlarge or restrict them. In the face of such a disposition on the part of governments, armies of excessive size can only provoke the danger and fear of a breach of the peace of Europe.

In view of all of these considerations, the Austrian Government had itself reduced its effective military force, and it accepted the English proposition with pleasure. The question could be decided in the future conference which would be convoked in accordance with the convention of November, 1815. The Court of Austria consented to support the proposition of the Russian Government concerning a "natural status of peace" for European armies and nations.

2. LETTER OF NAPOLEON III TO THE SOVEREIGNS OF EUROPE¹

In the presence of events which daily arise and demand attention, I believe it necessary to speak frankly to sovereigns to whom is confided the destiny of nations.

Whenever far-reaching disturbances have shaken the foundations of States and altered their boundaries, solemn agreements have followed to arrange the new elements and, by rearranging them, to sanction the transformations which have been accomplished. Such were the purposes of the Treaty of Westphalia in the seventeenth century and the negotiations at Vienna in 1815. On the latter basis the political structure of Europe rests to-day; but, Your Majesty is not ignorant of the fact that it is crumbling away on every side.

If the situation in the different countries is carefully considered it is impossible not to recognize the fact that the treaties of Vienna have been destroyed, modified, ignored or attacked at nearly every point. As a result we have duties without law, rights without title, and claims without bounds. A danger more to be feared is that the improvements brought about by civilization, which has bound people together by the solidarity of material interests, would make war still more destructive.

That is a subject for serious consideration. Let us not wait to reach a decision until sudden, overwhelming disturbances confuse our judgment and lead us in opposite directions in spite of ourselves. I therefore propose to Your Majesty to settle the present and insure the future through the convocation of a congress.

Having been called to the throne by Providence and by the will of the French people, but having been educated in the school of adversity, I should perhaps be less entitled than some other to ignore both the rights of sovereigns and the legitimate aspirations of peoples. Therefore I am ready, without having any preconceived ideas, to bring to an international council a spirit of moderation and justice, the ordinary lot of those who have endured so many and diverse trials.

If I take the initiative in such a matter, I am not moved by vanity; but, as I am the sovereign to whom has been attributed the most ambitious projects, I feel at heart that I should prove by this frank and sincere proposal that my only purpose is to attain the pacification of

¹Cf. *Annuaire diplomatique de 1863*, iv, p. 188.

Napoleon III (1808-1873), president of the Second French Republic, and later Emperor of the French.

Europe without any disturbance. If this proposal appears seasonable, I beg that Your Majesty will accept Paris as the place of meeting.

In case the princes who are allies or friends of France should deem it proper to increase the dignity of the deliberations by their presence, I shall be proud to offer them cordial hospitality. Europe might perhaps see some advantage in making the capital from which the signal of revolution has so often gone forth, the seat of a conference intended to promulgate the bases of general peace.

I take this opportunity, etc., etc.

Written at Paris, November 4, 1863.

NAPOLEON

Countersigned: DROUYN DE LHUYS

3. PROPOSITION OF MR. ROLIN-JAEQUEMYS¹

At the meeting of the Institute of International Law at Heidelberg in 1887 Mr. Rolin-Jaequemys proposed: "That it examine from the point of view of international law whether, and to what extent, and by what means, it would be possible to restrict the effective forces of European States and the amount of their military expenses in time of peace within certain proportionate limits to be determined by treaties between those States."

Then, upon developing his theme, the speaker stated that it covered by implication the following three questions:

1. Is it possible, from the point of view of the principles of international law, for two or more States mutually to agree by treaty to limit their respective armaments?
2. To what extent could such a mutual agreement be made by the different European States, and, if it were made, would it bind them?
3. What means should be employed to insure an effective sanction for such a treaty?

The question is: *How far do the generally admitted principles of international law oppose or support the fixing of such a limit by treaty, and, in case of necessity, the adoption of the necessary measures to guarantee the observation of such treaty?* It is enough to state the question thus to see that the discussion, restricted to these points, does not run the risk of degenerating into a political argument. Now this statement simply summarizes from the point of view of principle, extent, and sanction, the three separate questions which I have just formulated.

In order to make this point very clear,—and it is of prime importance, because, once established, it will, I hope, give me a means of meeting very easily the other objections,—I am going to address myself to the vital principle the scope of which the Institute will first of all have to determine when it takes under consideration the question I am submitting to it.

¹Cf. *Revue de droit international*, vol. xix (1887), pp. 398-404.

Gustave Henri Ange Hippolyte Rolin-Jaequemys (1835-1902) was a founder of the Institute of International Law and of the *Revue de droit international et de législation comparée*, of which he was editor-in-chief for many years. He served as Minister of the Interior of Belgium (1878-1884), general adviser to the Siamese Government (1892-1901), and latterly was a member of the Hague Permanent Court.

This vital principle is the independence, the autonomy of every sovereign State, and as a corollary thereof, the right and the duty which it has to defend its existence by all preventive or present means within its power. This principle, which will doubtless be invoked in opposition to my proposition, I recognize and claim, not merely as a patriot, but as a jurist. I agree that the State which renounces the right to defend itself commits suicide as much as the State which renounces the right to exist. I would not admit the legality of such a hypothesis for my little country any more than for the largest State.

If there are any among us who fear that the debate upon my proposal will become the pretext for attacks upon the armaments of this or that State, considered individually, let them therefore be reassured. The question is not to judge, still less to condemn, the sacrifices which this or that nation in the present status of international relations believes indispensable to impose upon itself in order to remain the master of its domain. The question is a higher and more general one. It seeks to know whether there is not, alongside the individual right to exist and defend oneself, a right, and a common right and duty, for all States forming part of one and the same group, to prevent the constant increase of means of defense from becoming the cause of exhaustion, decadence, economic and social disorganization, for the entire group. In other words, does not the principle of life which creates rights and imposes on each State, considered by itself, individual duties, impose collective duties upon the entire group of European States? If it is suicidal for a nation to remain unarmed in the midst of armed neighbors, is it not another method of suicide for a group of nations, united by a common civilization, to allow themselves to be carried away in a body, in a mad rush to cast a constantly increasing portion of their money, credit, physical and intellectual activity each year into the ever-expanding gulf of military expenditures and armaments?

It is impossible to deny that such a situation exists, and that the end of the present course in Europe can be only war—the destruction of the weakest by the strongest,—or ruin—the destruction of the poorest by the richest. Even those among us who have most formally declared themselves in opposition to my proposition, will not venture to maintain that the present situation is normal. Furthermore, the famous Marshal von Moltke several months ago defined this situation as follows: “All Europe,” he said to the Reichstag on December 4, 1886, “all Europe is under arms: wherever we may look about us we see our neighbors, on the right, on the left, armed and overladen with

the equipage of war the weight of which it is difficult to bear, even for a rich country. *This situation can not continue indefinitely . . .*"

I shall not repeat here what I said in my note submitted to the Institute last May. I shall not speak, therefore, in detail of the three million men, nor of the four billions of annual expenses, which are the figures already reached at the beginning of the present year by the effective forces in time of peace and the military expenditures of the seventeen States of Europe.¹ I shall not dwell further upon the dangers of every nature, political, economic, social, which follow such a state of affairs and its rapid aggravation, nor of the disastrous inequality which it creates between the European and American States in the battle for life. I simply ask whether we may consider this question foreign to international law,—the question as to whether a situation so eminently dangerous imposes upon European Powers the strict duty to confer together, if not to end it at a blow, at least to arrest its development.

¹The exact totals are, according to the Statesman's Year-book of 1887, 3,031,504 men and 3,960,718,500 francs. The effective forces in time of war are more than 10 million men and the expense of their maintenance during a year would exceed thirteen billions.

4. OPINION OF MR. LORIMER, PROFESSOR IN THE UNIVERSITY OF EDINBURGH, ON THE QUESTION OF DISARMAMENT¹

It seems to me that before discussing this question we should consider the following points as established in advance, as the premises from which we should derive the final solution :

1. *No free State shall consent to a change of any kind whatever in its relation to other States, if this change is to result in diminishing its defensive strength, or hindering its future development.*

A modification of the *statu quo*, or a reestablishment of the balance of power cannot be attained by peaceful negotiation. To impair existing conditions in this regard nothing less than war would be required, or the gradual action of those causes of progress or decadence which are beyond any immediate human control. If, therefore, our purpose is to diminish the chances of war, we must accept the equilibrium now established, however unstable or unsatisfactory it may seem to us.

2. If the preceding proposition is correct, it follows that *our efforts in the direction of disarmament should inevitably be based upon the principle of proportion*, that principle which all publicists, ancient and modern, acknowledged to be of such importance up to the time it was trodden under foot and lost from view in the trouble and confusion of the French Revolution. If we follow this principle, whatever may be the absolute reduction in the effective force of a State, its relation to other States will remain the same, because a corresponding reduction will have been made in the effective forces of all other States with which it might come in conflict.

3. *No independent State shall submit to any supervision of the administration of its revenues or of its domestic affairs.*

Each State should be left to decide for itself the manner in which it should proceed to reduce its armament, either by the decrease of the strength of the armies (standing armies, volunteer troops, or others), or by the abandonment of fortresses, of war vessels, gun-boats, tor-

¹Cf. *Revue de droit international*, vol. xix (1887), p. 473.

James Lorimer (1818-1890), an eminent Scotch publicist, was professor of public law and the law of nature and nations in the University of Edinburgh and a member of the Institute of International Law. In the field of international law his principal work is *The Institutes of the Law of Nations*, 2 vols., Edinburgh and London, 1884.

pedo-boats, etc. The requirements for the defense of the different States as between themselves vary so continually that it is neither possible nor desirable for them to agree upon a uniform application of their military expenditures. It seems to me that all we can hope for is to persuade them to agree to a uniform reduction of these expenditures themselves. A treaty by which they would agree to reduce their present war budgets by 25 or 50 per cent, or, in view of the inevitable changes which must occur in the basis of taxation, to diminish the fraction of their total revenue which they will devote to military expenses, would result in maintaining the present relationship between their respective forces, while leaving them free to organize such forces according to their necessities, present or future. The risk of war would be diminished by the limitation upon the combustible matter in each community, while the relief from taxation and compulsory service would increase wealth and furthermore direct the attention of each generation toward occupations of civil life.

Is it objected that the diversity in the character of the populations of the different States would tend to impair the equal diminution of their real military force, if we limited ourselves to demanding an equal diminution of expenditures? Russia, England, and France have within their more or less direct control, barbarian or semi-barbarian hordes which they might place in line and keep under arms, even in Europe, at less expense than a corresponding number of European troops! This objection is more apparent than real. Such troops would never stand before an almost equal number of European soldiers. Real military strength therefore would continue to be approximately proportional to the cost thereof. The growth of transportation facilities has in recent times rendered possible the employment of Asiatic or African auxiliaries in European wars. But we should not forget that this undoubted result of such growth will probably be more than counterbalanced in the long run by a contrary effect. The construction of railroads and canals tends to develop local industry and turn the energy of native populations dependent upon us from military occupations and toward the works of civil life. This will result in a diminution, perhaps slow, but continued, of the exclusively warlike classes who, at least in India, still have no other desire than to be employed in the army.

There is a question of considerable and growing importance to which I desire to call the attention of my colleagues in the Institute, although I do not myself see any satisfactory solution thereof. It is evident that at present we are only in the first stages of the application

of explosives to warfare. Although enormous sums have been and are being expended upon the manufacture of torpedoes, and upon the construction of vessels intended to discharge them, or, as we say, to "sow" them, their effect in a maritime war has not yet been experienced. It is probable that non-maritime nations exaggerate the importance of these engines considerably. But the torpedo is doubtless only one of the numerous forms of explosives which will be used in future wars.

If no other limit is placed upon the use of these new methods of destruction except that of the discoveries of chemistry and the inventions of the mechanician, it may result in augmenting the horrors of war almost beyond conception. It may be that a simple bomb well aimed may cause the destruction of an army and change the course of history. But is there a single State which would consent to bind itself, or limit itself, in the use of these new methods, which are equally as effective for defensive as for offensive operations? Or, if a nation did so bind itself, does the manner in which treaties have been observed in the past indicate that such treaties would be respected in a war *à outrance*? Would it be possible to prevent, to limit, or even to regulate, the use of gunpowder by treaty? In the absence of an international executive I fear that the answer to these questions can only be negative in the future as it has been in the past. Until international law reaches such a stage that the observation thereof will be guaranteed by some positive system, its only sanction consists in a coalition of States determined to maintain it. It might not be impossible for such a coalition to succeed in imposing certain rules which might be decided upon among its members as to the use of explosives, in the same way that it would impose certain limits upon their respective armaments. But such a coalition furnishes the edifice of international law with only fragile support. That is why I repeat what I have so often said, and written: the final problem of our science and international politics is the formation of international legislative, judicial, and executive powers.

But the question of disarmament is too urgent to await the formation of an international body which can not be dreamed of at present, however desirable or even indispensable it may be in the final analysis. Diplomacy furnishes only a very imperfect equivalent of the regular operation of the powers which formulate and apply the laws within a State. But this equivalent is the only one to which the international jurist may apply, and we must make the best of it.

From an economic point of view the disadvantages of partial disarmament may be asserted, because of the influence which it will have on the labor market. The market is restricted in many directions. Is this the time to throw into it hundreds of thousands of the strongest men of each community? I do not deny that the first effect of the measure would be to cause some disarrangement and some difficulty on this point. We could, in order to handle the transition, make the reduction gradual, limiting it, for example, to five per cent per annum until the agreed limit was reached. The difficulty in any case would be only temporary. Although the men under arms do not receive wages they consume them. The costly luxury of their maintenance is borne by the class which earns wages, and the maintenance of this luxury diminishes by that much the resources which this class might use for its necessities or enjoyment. Whether we regard labor as paid by capital or as self-sustaining, it is certain that it is only by labor that those original sources of wealth, moral or material, which nature has placed at our disposition, may be utilized, and it would be impossible to maintain that no loss results from the employment of labor in non-productive, not to say destructive occupations. Looked at from this point of view the limitation of armaments in the present state of affairs in Europe might be compared to the ligature of an artery from which the life of a man is ebbing away with his blood. A certain local difficulty may result from the stopping of circulation in the regions nourished by the artery, but the blood will pass through other channels, circulation will be reëstablished, and the patient will avoid death. By a strictly analogous process the fruitless labor of the soldier will be replaced by the fruitful labor of the workman and the artisan. What men lack is not the opportunity to work, but the means to support them and pay them while they work. Now, more wealth signifies higher wages and more opportunities to enter upon new enterprises. It will require a great deal of time still to exhaust the resources of our planet, and for man to finish gathering all of the treasures of well-being which God has placed at his disposition. The principal cause of this depression, of which there is much talk, and which attacks industry in all forms, is found in this ruinous rivalry of armaments and military expenditures in which all the great nations of Europe have permitted themselves to become engaged, and into which they are dragging the less important States. The progress of exhaustion is rapid, and we have still worse days in store if this artery can not be closed.

5. REFLECTIONS UPON THE GROWING ARMAMENTS OF EUROPE BY COUNT KAMAROVSKI¹

The introduction of an *international organization* becomes more urgently necessary from year to year, especially in view of the most serious *practical* interests of nations.

We are now living in a period of hard times. Almost everywhere we hear complaints about the evil state of commerce and affairs in general, about the pitiful economic situation; we point out the painful conditions under which the laboring classes eke out a bare existence, and the growing impoverishment of the masses. And in spite of that, States, in their endeavor to maintain their independence, almost pass the bounds of reason. On every hand new taxes are introduced, which, in our day, burden the population more and more. Cast a glance at the budgets of the European States of this century, and we shall be especially surprised by their enormous size and constant increase. Whence comes this evil, then, which threatens to drag the whole of Europe sooner or later into inevitable bankruptcy? It is certain that it is principally due to the growing increase of *military expenses*, which ordinarily swallow up a third, and sometimes a half, of the European budgets. And what is more to be deplored is the fact that so long as the present state of affairs continues we can scarcely foresee an end to this increase in the budgets and the accompanying impoverishment of the masses. What is socialism itself if it is not, at least in a large measure, a protest against this abnormal condition in which the greater part of the population in our section of the globe finds itself?

It is evident that governments have already understood this for a long time if not as a matter of theory, and out of love for the abstract principles of equity, at least because they feel more and more how heavy and painful is the burden of the demands actually made by the present system. Then, too, they have successively engaged in attempts to relieve the masses and combat the evil which springs from the

¹*Revue de droit international*, vol. xix (1887), p. 479.

Count Leonid Kamarovski (1846-1912) was professor of international law in the University of Moscow, a member of the Institute of International Law, and author of the well-known and authoritative treatise on an International Court of Justice which appeared in the Russian language in 1881 and was translated into French by Sergiei Westman under the title *Le tribunal international* (Paris, 1887).

proletariat. It is not difficult to see that these measures may be placed in three categories. On one side, we observe a return to the *colonial policy*, the desire to appropriate new lands in other parts of the world; on the other hand, the efforts of governments to revive industry and the economic well-being of the people by the *increase of import duties on foreign goods*. This leads to the strengthening of protectionism, which tends almost everywhere to replace free trade, so much in favor during the decade from 1860 to 1870. In the third place, governments, in their battle with socialism, publish domestic *laws* on the insurance of workmen, etc.

It must be admitted that all of these measures are weak and ineffective. If, on the one hand, they ameliorate to a certain extent the evil against which they are directed, on the other hand, they do not strike at the root of the evil, but on the contrary produce another evil. So far as the colonial policy is concerned, by which Prince Bismarck and his partisans wish to increase the well-being of their country, it is certain that it increases the antagonism among the peoples of Europe by carrying their competition into other parts of the world, and that it therefore tends far less to the pacification of European States than to the renewal of the rivalry and animosity of which the history of the sixteenth and following centuries shows many and sad examples. Besides, colonies are very expensive and, finally, do not long remain attached to the mother country. They may be compared to fruits which hang on the branches of the mother country until they become ripe. Emancipation, that is the law of their development.

The other measure, purely economic, is also a two-edged sword; it is dangerous from the point of view of foreign relations of peoples, because it naturally calls forth reprisals. It causes what we call to-day "an economic war." If a State, with a view to developing its material well-being, forbids, or strongly restricts (by high import duties), the importation of foreign goods into its territory, this State is acting within its strict rights. But the same rights belong to other States, and if they suffer from our high tariff, they will naturally try to attack us in the same manner, that is strike at the most vulnerable point of our economic system. This results in endless discussions which become all the sharper as they reach more deeply into the material interests of men. It is an underhand war among the peoples of Europe. This measure is dangerous also from another point of view, that of national policy, in the sense that, while really contributing sometimes to the development of some branches of national industry, it may also lead to the weakening of other branches, and while increasing the *quantity*

of the products in the country, it may lower the *quality*. Confiding in the protection of the State, and not fearing foreign competition, the industries pay little attention to the well-being of the consumers, who might, under a more liberal economic *régime*, have received necessary products either better in quality or cheaper in price.

We therefore repeat that these two measures, colonial policy and protectionism, are in the final analysis retrograde measures, which keep awake antagonism among peoples. And the greater this antagonism becomes the more the people are obliged to arm themselves, as the French say, to the teeth. This is, in short, the situation in which the States of Europe find themselves to-day. Their rivalry in this sphere goes indeed to the height of folly!

It is more than time to stop and seriously reflect upon the question of *disarmament*. That is not an idle question,—it is the question *to be or not to be* among European nations and even throughout our civilization in general.

Contemporary militarism shows us clearly the insufficiency of the policy, whether foreign or domestic, of Christian peoples. They must get out of this situation at any price, if they do not wish in time to become the victims of *barbarians from within* (adherents of different destructive parties), as Rome and the ancient civilization succumbed to the attacks of barbarians from without.

The defenders of the monstrous contemporary militarism say that these innumerable armies are indispensable to States for their own preservation. With the development of our civilization the price of all necessities of life has so increased that the expenses for the armies appear to be an insurance premium paid by us for those objects. But this argument rests upon an apparent sophism. There is no relation between the needs for interior security and the enormous existing armaments. Not only do these armaments greatly surpass the necessary bounds, but, being the principal cause of the economic crisis of our days, they are in fact the things which provoke and perpetuate this phantom of war which it is apparently their purpose to appease. The tension of the "armed peace" becomes so painful and insupportable for peoples that it will end by making them prefer war to this condition. The enormous armies themselves present an eternal menace against the peace of peoples.

How shall we get away from this nightmare which weighs upon the whole world?

There is no possible way out if this or that State should act alone, because what government would decide to set about its own destruc-

tion and diminish its military strength in the presence of neighbors which are better armed than it?

It is therefore evident that this fundamental question can be decided *only in the field of international law*. But there, it seems to us that the serious and united efforts of peoples may be able to accomplish much. The silence of the greater part of modern internationalists on this subject astonishes us. Even the greatest authorities and those most disposed to embrace the cause of progress are silent when they fear they are going to touch upon this monster. However, it should be the duty of the science of international law to raise its voice continually on this question. As we know, the Edinburgh professor, Mr. Lorimer, is a brilliant exception upon this point.

The question of disarmament may be decided in the most satisfactory manner only on condition that a judicial organization of the entire common life of States be created. But even now, we may point out some *preliminary conditions* for the acceleration of this solution.

In the first place, this question should be placed upon the *international plane*, as we have already said. We mean by that that *all of the States* of Europe are equally interested in studying and deciding this question practically. But the duty falls especially upon the Great Powers to take the initiative in the direction of this reform. For they are above all those which, by their military supremacy, eternally menace the general peace, in spite of all of the testimony of their official representatives and their press. Their armaments have reached such dimensions that, willing or not, these States are driven thereby to seek causes for dissension and rivalry among themselves in everything. From another point of view, their military forces have already, in fact, deprived secondary States of the possibility of making war. It is true that the latter may still, in concert with one of the Great Powers, have some weight in the political balance of Europe, but does not such an alliance remind us of the fable of the iron pot and the earthen pot? Among the Great Powers the first example of good-will and sincerity should come from those Powers which are most responsible to-day for keeping Europe in eternal fear of war, that is, Germany and France, and after them, England and Russia.

The strong should inaugurate this reform, the weak should follow.

In the second place, it is indispensable to consider this question as *seriously* as possible and from *all points of view*. If governments are in reality, as they pretend, animated by love of peace, they should be ready to make great sacrifices and to renounce many prejudices and claims to give to their peoples this most inestimable boon: peace, which

is itself the first and fundamental condition of all human progress. That is why we must examine in advance in *preliminary conferences*, and then in a *final congress*, the causes which most inspire antagonism and enmity among European peoples. If we did not, even in these deliberations, reach positive results at first (in the sense of direct agreement), at least the meeting of such conferences would be of itself a step toward the pacific solution of a large number of disputes existing among peoples. Finally, we should have gained by this proceeding an opportunity to ascertain the general opinion of Europe on the questions in controversy.

In the third place, we do not interpret disarmament in the absolute sense of the word, but as a *joint, gradual*, movement, executed by the States of Europe in accordance with *principles agreed upon by common accord*. The principles which fix the number of troops may be regulated by the indices of *real life*. These would be, for instance, the population, the requirements of domestic security, the size of territories outside of Europe and colonies, etc., which it would be necessary to take into consideration in fixing the size of the armies. Mr. von Holtzendorff, in rejecting the idea of disarmament, observes that the States situated in the center of Europe are more exposed to danger of attack than those on the outside. The position of Germany, for instance, is more perilous than that of Russia, in view of the fact that the latter can not be threatened from more than one side (west) and the former may be threatened from several sides at once. Mr. von Holtzendorff seemed to forget that the reform proposed by us must be general and simultaneous; therefore, it would not menace some any more than others. The greatest danger for all, to-day, undeniably consists in the general distrust, and in the disposition of each to attack its neighbor on the most frivolous pretexts.

In the fourth place, in view of the extreme complexity of this reform and its novelty in the practice of States, we might recommend its adoption for a certain *period*, in order to accustom governments and peoples to its full adoption in the future. This period might be fixed in accordance with experience, after a mature study by all the States of Europe.

By that method the first really serious attempt would be made, not in words, nor on paper merely, for the pacification of European States.

In the fifth place, so far as the *guaranties* of the reform which we are discussing are concerned, they would be furnished by the *collective protection* of all the States which might have adopted the reform, and in time, by a more effective protection, that of *international organization*. A State which violated the conditions set forth in the act of

disarmament would by that very fact excite all the other States against it. We might, on this point, provide in the act of progressive disarmament a complete system of repressive measures, carefully worked out. And later, we might finally decide the last great question, viz.: the organization in Europe of an *international police force* which, we might say, would take upon itself a part of the force concentrated in the different national armies, but which, acting in all its fields according to the strict principles of international law, would be the guardian of the general peace and justice upon earth. Doubtless the organization of such a force would be a very difficult work, but the good which would come therefrom would be so great that internationalists should work with zeal toward the solution of this problem.

Furthermore, the perfection of an international organization by giving it such a guaranty is a goal toward which States are only beginning to grope their way. But if they never attain this goal, the *consequences* of their gradual and simultaneous *disarmament* will have procured for them inestimable blessings in both their domestic and foreign relations.

Thanks to the mutual confidence which would then be established between peoples, their governments would have at their disposition immense material resources, which they now dissipate unproductively for their armies and armaments, and which they might in the future devote to the improvement in all directions of the life of their peoples. They might then employ greater sums in the sanitation of the country, in public instruction, betterment of justice, increase of domestic security, the uprooting of the proletariat and socialism, in a word, in the cure of all those horrible plagues which gnaw at all of the European States to-day. This reform would permit them to found in peace colonies in other parts of the world for the surplus of their population and to open markets there for their products. A work of this kind might be undertaken by all European States together. Not only would this truly humanitarian and Christian policy increase the well-being and the security of the masses, but it would contribute to the improvement of the soil and the development of its productive energy.

Notwithstanding these innumerable works, and even others, the governments which consider seriously the question of disarmament would be able to lighten the financial burden which weighs upon the people, and, on the other hand, to battle with more success against the enemies of domestic order and security. In short, whatever the defenders of the present status may say, militarism, more than anything else, supports not only wars, but also revolutions in modern States.

Let no one object that this reform may enervate morally the peoples of Europe and leave men able to enjoy only material things. Disarmament as we understand it does not at all signify the suppression of the military forces of States, but their reduction to the actual requirements of domestic security, and their renunciation of all attempts against the independence and liberty of other peoples placed under the protection of the international organization. This would not result in any detraction from the high mission of warriors to be the guardians of the liberty and independence of their fatherland. Disarmament in itself would not prevent the discipline of the male youth of the population in military exercises.

It probably would not cause war to disappear entirely, but it would make war rarer and more just.

We refuse absolutely to look upon war, as do Count von Moltke and its numerous apologists, as the principal counter-irritant for the moral weakening and decadence of peoples.

The latter pass into decline like individuals, not by peace, but by contempt for the moral principles which govern the life of mankind. The weakening of these principles leads to wars which only accelerate the fall of nations by bringing to them instead of liberty the chains, sometimes golden, but always heavy, of domestic and foreign servitude.

6. DAVID DUDLEY FIELD ON A LIMIT OF PERMANENT MILITARY FORCE¹

In time of peace, the number of persons employed at any time in the military service of a nation, whether intended for land or sea, shall not exceed one for every thousand inhabitants.

A large standing army is not only the enormous burden that it has been described, but it is a provocative to war. The arming of a nation should be looked upon very much as the arming of individuals. A man may keep arms in his house, to be used on occasions, but if he walks abroad, always armed to the teeth, he speedily gets into a quarrel. So with a nation. The peace of society would certainly be endangered by the general practice of wearing arms. It was once so. And since social manners have been benefited by a general disarmament of individuals, it should seem that, for a similar reason, national manners would be benefited by a like process.

Examples of partial national disarmament are not wanting. The treaty between the United States and Great Britain, made at the close of the last war between them, stipulated that neither should keep ships of war upon the great lakes that divide them.² The treaty of Paris, which closed the Crimean war, provided for the disarmament of Russia in the Black sea.

The object of a military establishment is security, internal and external. The standing army of the United States is 30,000, giving one soldier to every thirteen hundred inhabitants. Yet these 30,000 men are scattered over a territory larger than that of any European State, and they have to keep watch of numerous Indian tribes, and to garrison many fortresses; a greater number probably in proportion to the population than those of any other nation in the world. It is true, that this country has no dangerous neighbors; but if a general disarmament should be adopted, the most powerful European State would hardly be a dangerous neighbor to the weakest. For the purpose of

¹David Dudley Field, *Draft outlines of an International Code*, Article. 528 (2d ed., 1876), p. 367.

Mr. Field (1805-1894) was an eminent American publicist, lawyer, a partisan of codification of municipal law, and one of the founders of the Institute of International Law.

²This agreement is printed in Pamphlet No. 2 of the Division of International Law of the Carnegie Endowment for International Peace.

internal security, one armed guardian of the peace to every thousand persons should seem to be sufficient, acting in conjunction with the militia, which should chiefly be relied on for security against internal commotion.

The building and arming of fortresses could scarcely be regarded with apprehension, inasmuch as they are defensive. Ships do not, it is true, fall within the same category, for they may be regarded as movable fortresses, but they are limited in their operations. To bind a nation not to build them and lay them up, should not be considered essential to the security of States.

Militia should be regarded as a strong arm of nations, both for internal peace and external defense. For the support of the civil powers, in the execution of the laws, no other force is so natural and proper. It is cheap, ready and efficient. For national defense against external attack, it may, upon emergency, be converted into formidable armies. The last war between France and Prussia has shown how powerful a force a citizen soldiery may be made. In France, the national guard has on many occasions been the defender of order. In the United States, the militia has not only supported the civil power in executing the laws, but it has formed the nucleus of an army of volunteers of the most effective kind.

7. OPINION OF MR. MÉRIGNHAC¹

Disarmament would be, in the first place, *simultaneous and collective*, because to the extent that it might become possible and obligatory when each one had consented thereto, it would, in the contrary case, become a deceiving and imprudent act of such gravity that no government would care to assume the responsibility therefor. Disarmament, in the second place, could only be *partial*, since, for the reasons above given, a domestic force is necessary to each State. Finally, it should be *proportional and progressive*; for the decrease would be made by successive reductions until the contingent which might be fixed for each of the nations of Europe were reached. By adopting this procedure States could remain upon the defensive in the possible event that some of them might not keep their agreements. This thought answers the very proper prejudices of some publicists who call attention to the fact that if a power disarms it exposes itself to the danger of not being followed by others. These fears, which might be seriously considered if immediate and complete disarmament were contemplated, would be baseless if disarmament were made in instalments under conditions carefully determined in advance. As for the methods of determining the ratio, we find several systems presented to us. The first consists in disarming in proportion to the population of each State. But it has been observed, and rightly, that under this process certain Great Powers which have to-day armed forces approximately equal, would be made inferior to one another, for instance, France as compared with Germany. It would be better, it seems, to establish the effective forces of Europe upon the basis of their peace footing at the time of disarmament. The States would then be left in a position identical with that occupied by them before disarmament, because each would suffer a reduction in proportion to its former strength.

Two other methods of establishing the proportion of the forces to be retained by each nation after disarmament have been proposed,

¹Mérignhac, *Traité théorique et pratique de l'arbitrage international*, p. 512, section 549 (Paris, 1895).

Alexandre Mérignhac, born 1857, is an associate of the Institute of International Law and professor of international law in the faculty of law of the University of Toulouse. Other works of this author on arbitration are *La conférence internationale de la paix*, Paris, 1900, and *Le traité d'arbitrage permanent au XX^{ème} siècle*, Paris, 1904.

which seem to us powerless either to attain the desired goal, or to harmonize with the exigencies of military instruction. The first consists in fixing an age limit above which States would agree no longer to call their subjects to the colors, thirty years for instance. But by this plan the strength of the armies in time of peace would not be reduced, even if the above-mentioned limit were reduced to twenty-five years. In fact, on the present peace basis the soldiers of European armies are taken during the ages of twenty to twenty-five into the military contingents for a given period, the length of which varies with States. Such is, at least, the regular, normal situation.

The second method proposed consists in reducing the active service in times of peace to one year; it is subject to insurmountable technical objections. Now the two years' service seems too short to certain specialists; in all cases, everybody agrees in condemning annual service as absolutely insufficient for the formation of the list of officers, instruction of special corps and particularly of the cavalry, in short, for the education of the soldier in general. Annual service would produce troops of too little training for purposes of mobilization, would suppress that spirit of tradition and discipline in the army which only time can produce, and which forms truly national, homogeneous troops, and would take the army back to the ancient type of national guards. Besides, anyone familiar with the matter knows that the time actually passed with the colors is always noticeably less than the theoretical time, because of sickness, furloughs, and various duties required by military service outside of instruction, properly speaking. A service of two years seems, therefore, from the foregoing, an indispensable minimum, if it is sufficient, which we are not here to discuss.

8. OPINION BY IVAN S. BLOKH (BLOCH), COUNCILOR OF STATE¹

FUTURE WAR AND ARMED PEACE IN THEIR SOCIAL AND ECONOMIC EFFECTS.

The question as to what social and economic consequences a great war would now have in Europe is never seriously discussed by governments although it is of the highest importance. For the last decades have produced profound changes in social and economic fields, changes of still greater scope than those exhibited by the art of war and tactics. However, the governments diligently avoid such investigations, as the following example shows: when Freycinet was minister of war in France, a statement of the economic conditions under which a war would fail was discussed, *but it came to naught because of the opposition of the military circle*.—Let us try to imagine approximately what the situation is.

The wars of 1866, 1870–71, and 1877–78, were not wars which drew in the whole of Europe out of sympathy; a future war would, however, probably divide Europe into two immense camps and perhaps rage over the entire European continent.

Furthermore, armies have changed. Only Prussia in the last war led the militia in great numbers into the field; elsewhere the hosts were all active armies. To-day, however, war would tear from productive earning ability millions of men, who would hasten to the battlefield.

It is clear to every thinking man that if such an immense mass of workers is suddenly torn from productive activities it must lead to far-reaching disturbance in economic life.

¹Cf. Johann von Bloch, *Der Krieg*, Berlin, 1899, vol. vi.

The above extract appears at pages 42 et seq. of a pamphlet entitled *Der Krieg der Zukunft; Auszug aus dem gleichnamigen russischen Werke des Staatsrats Johann von Bloch mit Genehmigung des Verfassers herausgegeben von Mitgliedern des Münchener Komitees für Kundgebungen zur Friedens-Konferenz* (Berlin, 1899). The author's work in the original Russian, of which the first above-mentioned publication in six volumes is a German translation, was published at Petrograd and in French translation at Paris in 1898. In abridged form it has been translated into English by R. C. Long as *The Future of War in its Technical, Economic and Political Relations*, 1899.

Ivan Stanislavovich Bliokh (1836–1902), Polish financier, economist and writer on military affairs, became known to the world at large as a propagandist of universal peace partly by his articles in French, German and English periodicals but more particularly through his great work above referred to.

The following figures, as of the year 1891,¹ may give every reader something to think about. If we compare the number of men from twenty to fifty years old with the number of soldiers over which the armies of Europe would have command in time of war, we reach approximately the following result:

<i>War strength of the armies Men</i>	<i>Male population from 20 to 50 years old</i>	<i>Percentage</i>
Germany, 3,600,000	9,508,000	37.8
Austria, 2,062,000	7,683,000	27
France, 3,600,000	8,013,000	45
Russia, 4,556,000	22,669,000	20.1

Or in words: *over one-third* of the male population of Germany from twenty to fifty years of age, and almost *one-half* of the male population of France of the same age, would lay down the plowshare and tool to seize the sword! What must the result be? Who will nourish those dependent upon these warriors? What will happen to the intellectual life of Europe?

Certainly this one question presents an embarrassing problem to the defenders of war, for the figures collected above show that even mobilization of the armies must cause serious disturbances in the economic life of peoples. War itself would of course produce still different consequences.

The time has long passed when a people could be self-sufficient, because it was a complete, vital, economic community. To-day, because of the highly developed civilization, the life threads of the economic organisms are most strongly interwoven, and it is better to say: there is only one economic organism—world civilization. There are, so to speak, no longer any independent *individual* national systems of political economy, there is only *one world system!* In Germany we consume American, Russian, Australian grain, the flesh of Austrian, Russian, American herds. We dress in American cotton and Australian wool. The products of our industries go to all countries in the world, and this market in foreign lands is necessary to the existence of our enormously developed industries. And it is the same in all civilized lands. Let man interfere with the exchange of the products of industry, or disturb commerce among countries, and this entire artificial mechanism of world political economy, built up on the basis of the exchange of goods, would come to a standstill. Such consequences, however, must

¹*Kriegsheere der europäischen Staaten* (Armies of European States).

inevitably follow the war of the future, a war of entire States in all their complex relationships, a war on land and sea. It will cause nations to hunger, and nameless misery to fall upon millions of families. Millions of men will be robbed of their daily bread!—That is the blessing of war, which foolish and misguided men sometimes long for as the “purifying storm”!

If we wish to reach a decision upon these dangers, we must above all notice that peoples of different degrees of civilization are very differently affected in their social and economic existence by war. A country devoted especially to agriculture most easily revives from wounds inflicted by the sword. Land remains land, it bears its fruits after, as well as before, war; at the most the destroyed dwelling house and the burned barns of the farmer would have to be rebuilt. And the more primitive the methods of farming, the more easily the country revives. That is the explanation why, after the horrors of a seven years war, the damages were repaired in so short a time. The more complex the methods of farming, however, the more highly cultivated the soil, just so much more does the farmer suffer from damage. The lack of workmen brings about, for instance, incompetent management of the fields, and this alone brings with it heavy damages for the year where the system of rotation of crops has been developed.

But the devastation of war bears especially heavily upon a country the population of which wins its support principally from industry and commerce. As a result of the interference with intercourse, stopping of sales of merchandise, the disturbance of credit, industrial activity must be restricted, if not entirely discontinued. *But if the factories are closed, then millions of workmen who must necessarily live from hand to mouth because of their diminished wages, remain without means of subsistence, and, with their families, become the prey of misery.*

This danger is all the greater *since, in all civilized lands, the outbreak of war must and does at once produce a striking rise in the cost of living.* This increased cost rises with the continuance of the war, while the means of subsistence of the working people rapidly decreases. But not only will the proletariat be seriously affected, the other classes of the population will feel it too. There will likewise be a *general fall in the value of securities of all kinds immediately upon the outbreak of war, while discount rises rapidly.* The more highly developed, however, industry and commerce are in any country, the more dependent is every industrial manager upon the ingenious credit system, and the greater will be the effect of a disturbance of the system upon the

circulation of money. The number of bankrupts will increase beyond imagination, *and once again shall we see the ruin of thousands and thousands of families.* Therefore, people instinctively fear war; if they realized, however, all of the catastrophes which it brings to each individual, they could not even think of the possibility of war without shuddering.

9. OPINION OF BASTIAT¹

DISBANDING THE TROOPS

It is with a nation as with a man. When a nation wishes to indulge itself, it must see whether the indulgence is worth the cost. For a nation security is the greatest of possessions. If it is necessary to arm a hundred thousand men and spend a hundred millions to accomplish this, I have nothing to say. It is a possession purchased with a sacrifice.

Let no one, however, be misled as to the scope of my argument.

A representative proposes to disband one hundred thousand men to relieve the taxpayers of a hundred millions.

If we content ourselves with replying: "These hundred thousand men and these hundred millions are indispensable to the national security; it is a sacrifice, but without this sacrifice France would be torn to pieces by factional strife, or invaded by the foreigner,"—I have nothing to say here against this argument, which may be true or false in fact, but it does not contain theoretically any economic heresy. The heresy begins when it is sought to represent that the sacrifice itself is an advantage, because it is profitable to some one.

Now, if I am not deceived, the author of the proposition will scarcely have descended from the rostrum when some orator will rush forward to say:

"Disband one hundred thousand men! Think of it! What will become of them? What will they live on? Will there be work? Why, don't you know that work is lacking everywhere? That all vocations are overrun? Would you throw them on the market to increase the competition and lower the level of wages? When it is so difficult to gain a poor living, is it not fortunate that the State furnishes bread for one hundred thousand individuals? Consider, too, that the army consumes wines, clothing, arms, and that it in this way produces activity in the factories, in the garrisoned towns, and it is, in fact, Providence for its innumerable purveyors. Do you not tremble at the thought of destroying this immense industrial movement?"

You see that this argument leads to the retention of the hundred

¹Bastiat, *Ce qu'on voit et ce qu'on ne voit pas*, ch. ii. This pamphlet was published in 1850. It may be found in the fifth volume of *Œuvres complètes de Frédéric Bastiat* (Paris, 1854), in which the above extract appears at page 340.

Frédéric Bastiat, the eminent French political economist, was born in 1801 and died in 1850.

thousand soldiers for economic reasons, without regard to the necessities of the service. It is these reasons alone that I am to refute.

One hundred thousand men, costing the taxpayers one hundred millions, live and support their purveyors as far as the one hundred millions go: *that is what we see*.

But one hundred millions, gone from the pockets of the taxpayers, cease to support these taxpayers and their purveyors, as far as one hundred millions could go: *that is what we do not see*. Just make a calculation, figure, and tell me where you find any profit for the masses?

As for myself, I will tell you where the *loss* is, and to simplify matters let us speak of one man and a thousand francs instead of one hundred thousand men and one hundred millions.

Here we are in the village of A. The recruiting officers make their rounds and take away a man. The tax collectors make their rounds and carry off a thousand francs. The man and the money are taken to Paris, one intended to support the other for a year without his doing anything. If you look only at Paris, why! you are a hundred times right, the measure is very advantageous; but if you cast your eyes on the village of A, you will decide otherwise, because, unless you are blind you will see that this village has lost a workman and the thousand francs which would pay for his labor, and the activity which, by the expenditure of these thousand francs, he would spread about him.

At first glance, it seems as if there were some compensation. The phenomenon which used to occur in the village takes place at Paris, that's all. But here is the loss. In the village a man worked the ground and labored: he was a working man; in Paris, he practices "right dress!" and "left dress!": he is a soldier. Money and circulation are the same in both cases; but, in one there were three hundred days of productive toil; in the other there are three hundred days of unproductive toil; of course, assuming that a part of the army is not indispensable to the public safety.

But now comes the disbanding of troops. You point out to me an increase of one hundred thousand workmen, competition stimulated, and the depressing influence which it exercises upon the wage-level. That is what you see.

But this is what you do not see. You do not see that to disband one hundred thousand soldiers is not to destroy one hundred millions, but it is to return them to the taxpayers. You do not see that by throwing one hundred thousand workmen on the market you, at the same time, throw into the market the hundred millions destined to pay for their

labor; that consequently the same measure which increases the *supply* of laborers increases also the *demand* therefor, whence it follows that your decrease in wages is an illusion. You do not see that before, as well as after the disbanding, there are one hundred millions corresponding to the hundred thousand men; that the only difference is this: before, the country delivers the hundred millions to the hundred thousand men for performing maneuvers; afterwards, it delivers the money to the men for labor. You do not see, in short, that when one taxpayer gives his money, either to a soldier in return for nothing, or to a workman in return for something, all of the further consequences of the circulation of this money are the same in both cases; only, in the second case, the taxpayer receives something, in the first, he receives nothing.—Result: a dead loss for the nation.

The sophism which I am fighting does not stand the test when we increase the numbers, which is the touchstone of principles. If, allowing for all compensation and examining all interests, there is a *national profit* in increasing the army, why not enroll under the colors all of the male population of the country?

10. OPINION OF PRINCE L. E. OBOLENSKI¹

Now that the high ideal of general peace and disarmament is approaching realization after seeming, even so recently, only a Utopia in the imagination of some men of genius—friends of humanity—it is of the utmost importance to examine this problem, the most beneficial of all, with regard to the conditions surrounding its practical execution.

I shall limit myself to presenting a single one of these conditions, which is the most important of all, if it be only because it will serve as the probable basis for the more important objections which will be made against the high ideal.*

What, then, is this condition?

As recognized in the declaration of our Minister of Foreign Affairs, in our day the larger portions of labor and capital are diverted from their natural purposes and wasted in an unproductive manner. We spend hundreds of millions to purchase terrible means of destruction, etc. It follows, therefore, that according to the laws of political economy and the most simple logic, disarmament, that is the stopping of industries manufacturing materials for war, will produce an immense multitude of several millions of unemployed workmen and as large a number of capitalists with no employment for their capital.

The number of unemployed workmen will increase even in the following two ways, viz.: not only because the enormous enterprises exclusively designed for military purposes (including equipment, preparation of food supplies, etc.), will go out of business over night, but also because the millions of workmen who earned a livelihood therein in all countries will be obliged to search for work as ordinary laborers. In other words, the number of workmen in search of employment in one line of work will double, or perhaps treble at a stroke.

Now, all the world knows that every increase of those who demand work lowers the value thereof, that is the wage-level. The enormous influx of workmen without work created by disarmament would be of such a character as to lower the level of wages even below the plane which it has occupied in recent times in Europe, and which, however, was already so low that according to the statistics, the average length

¹Extract from the *Novosti* (St. Petersburg News).

Leonid Egorovich Obolenski (1845—), Russian philosopher, journalist and critic.

of life of the working classes in Western Europe was already considerably less than that of the other strata of the population.

That is the principal objection, the principal obstacle against which we have already struck in the literature of the question we are considering, and it will inevitably be raised again.

I believe that this so-called insurmountable obstacle does not withstand a serious examination, and that it is possible to indicate now the outline of the theory by which it may be avoided.

However, I do not blind myself to the efforts which partisans of a general peace will be called upon to exert to explain the possibility and even beneficial character of the plan which I propose. Until the possibility thereof is, so to speak, made evident (especially to Europeans) we shall behold an enormous theoretical and practical resistance to general peace, a resistance which will come not only from the side of the capitalists interested in the maintenance of the former industries intended directly or indirectly for the needs of war and the maintenance of armies, but from the working class in general whose interest it is to see the level of wages maintained on the same plane. In order to realize the force of the resistance which these two classes will be able to present, it must be remembered that they exert a considerable influence on the legislative and political movement of the West.

What, then, is the remedy under discussion, how can we escape from the cursed circle in which humanity is struggling at the present time?

The remedy is very simple, in reality, and partial allusion is made thereto in the economic literature of Western Europe.

States should plan in advance a series of productive public works in which the liberated capital and the unemployed workman may both find employment.

It is necessary that the capitalist and working classes be advised in advance that they will find plenty of channels ready to receive their superfluous activity and savings.

However, it is understood that the public works into which capital and muscular energy will be poured must be entirely new; I mean that they should not compete with industries which already exist: otherwise they will serve no purpose, because they will only give to some what they take from others.

But is there any way to create industries of public usefulness out of whole cloth? Are there any needs which the State may take the burden of assisting, as Russia for instance has assumed charge of the sale of

alcohol, of the construction of railroads, of the working of certain mines?

There is no doubt that such needs exist. If they have not been noticed before, if we have not yet dreamed of satisfying them, it is simply because we have not had at our disposition either the immense capital which will now be out of employment, or the quality of labor which the new industries will be able to call upon after the disarmament.

It is, of course, the task of specialists to work out the details of the question.

But now, looking at the question only in a very superficial manner in its novelty, who does not see, at least in Russia, needs such as roads to be laid out, deposits of sand to be removed, streams and rivers to be deepened and cleared, land to be replanted with forests, steppes to be irrigated, marshes to be drained, etc., etc.?

All of those needs, and I pass by many which are at least as important, are capable of furnishing work enough for immense bodies of laborers and enormous reserves of capital.

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PREFATORY NOTE

On December 12, 1916, the Imperial German Chancellor, von Bethmann-Hollweg, delivered an address in the Reichstag in which he stated the willingness of the German Empire, under certain conditions, to consider the question of peace with its enemies. In the same speech the Chancellor read to the Reichstag the text of a note which the Imperial Government had submitted, through certain neutral Governments, for consideration by the Entente Powers. An identical note was likewise submitted on the same date, through the same channels, by Germany's allies. The Entente Powers, by way of reply to these overtures, stated in similar official form the conditions upon which they would consider the question of peace with their enemies. Certain neutral Powers took advantage of these expressions of the respective belligerents to set forth their views as to the international situation.

It has been thought advisable at this time to collect the various official statements, and to issue them for convenience in a pamphlet, arranged in chronological order but without expression of individual opinion or commentary. The documents themselves have been taken from official sources whenever available.

JAMES BROWN SCOTT,

Director of the Division of International Law.

WASHINGTON, D. C.,

February 19, 1917.

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OFFICIAL COMMUNICATIONS AND SPEECHES RELATING TO PEACE PROPOSALS, 1916-1917

Extract from the Speech of Chancellor von Bethmann-Hollweg in the German Reichstag, December 12, 1916¹

The Reichstag had been adjourned for a long period, but fortunately it was left to the discretion of the President as to the day of the next meeting. This discretion was caused by the hope that soon happy events in the field would be recorded, a hope fulfilled quicker, almost, than expected. I shall be brief, for actions speak for themselves.

[Here the Chancellor referred to the entrance of Roumania into the war, and its intended effect on the western front.]

The situation was serious. But with God's help our troops shaped conditions so as to give us security which not only is complete but still more so than ever before. The western front stands. Not only does it stand, but in spite of the Roumanian campaign it is fitted out with larger reserves of men and material than it had been formerly. The most effective precautions have been taken against all Italian diversions. And while on the Somme and on the Carso the drum-fire resounded, while the Russians launched troops against the eastern frontier of Transylvania, Field Marshal von Hindenburg captured the whole of western Wallachia and the hostile capital of Bucharest, leading with unparalleled genius the troops that in competition with all the allies made possible what hitherto was considered impossible.

And Hindenburg does not rest. Military operations progress. By strokes of the sword at the same time firm foundations for our economic needs have been laid. Great stocks of grain, victuals, oil, and other goods fell into our hands in Roumania. Their transport has begun. In spite of scarcity, we could have lived on our own supplies, but now our safety is beyond question.

To these great events on land, heroic deeds of equal importance are added by our submarines. The spectre of famine, which our enemies intended to appear before us, now pursues them without mercy. When, after the termination of the first year of the war, the Emperor addressed the nation in a public appeal, he said: "Having witnessed such great events, my heart was filled with awe and determination." Neither our Emperor nor our nation ever changed their minds in this respect.

¹*The New York Times*, December 13, 1916.

Neither have they now. The genius and heroic acts of our leaders have fashioned these facts as firm as iron. If the enemy counted upon the weariness of his enemy, then he was deceived.

The Reichstag, by means of the national auxiliary war service law, helped to build a new offensive and defensive bulwark in the midst of the great struggle. Behind the fighting army stands the nation at work—the gigantic force of the nation, working for the common aim.

The empire is not a besieged fortress, as our adversaries imagined, but one gigantic and firmly disciplined camp with inexhaustible resources. That is the German Empire, which is firmly and faithfully united with its brothers in arms, who have been tested in battle under the Austro-Hungarian, Turkish, and Bulgarian flags.

Our enemies now ascribed to us a plan to conquer the whole world, and then desperate cries of anguish for peace. But not confused by these asseverations, we progressed with firm decision, and we thus continue our progress, always ready to defend ourselves and fight for our nation's existence, for its free future, and always ready for this price to stretch out our hand for peace.

Our strength has not made our ears deaf to our responsibility before God, before our own nation, and before humanity. The declarations formerly made by us concerning our readiness for peace were evaded by our adversaries. Now we have advanced one step further in this direction. On August 1, 1914, the Emperor had personally to take the gravest decision which ever fell to the lot of a German—the order for mobilization—which he was compelled to give as a result of the Russian mobilization. During these long and earnest years of the war the Emperor has been moved by a single thought: how peace could be restored to safeguard Germany after the struggle in which she has fought victoriously.

Nobody can testify better to this than I who bear the responsibility for all actions of the Government. In a deep moral and religious sense of duty toward his nation and, beyond it, toward humanity, the Emperor now considers that the moment has come for official action toward peace. His Majesty, therefore, in complete harmony and in common with our allies, decided to propose to the hostile powers to enter peace negotiations. This morning I transmitted a note to this effect to all the hostile powers through the representatives of those powers which are watching over our interests and rights in the hostile States. I asked the representatives of Spain, the United States, and Switzerland to forward that note.

The same procedure has been adopted to-day in Vienna, Constanti-

nople, and Sofia. Other neutral States and his Holiness the Pope have been similarly informed.

[The Chancellor then read the note.¹]

Gentlemen, in August, 1914, our enemies challenged the superiority of power in the world war. To-day we raise the question of peace, which is a question of humanity. We await the answer of our enemies with that serenity of mind which is guaranteed to us by our exterior and interior strength, and by our clear conscience. If our enemies decline to end the war, if they wish to take upon themselves the world's heavy burden of all these terrors which hereafter will follow, then even in the least and smallest homes every German heart will burn in sacred wrath against our enemies, who are unwilling to stop human slaughter in order that their plans of conquest and annihilation may continue.

In the fateful hour we took a fateful decision. It has been saturated with the blood of hundreds of thousands of our sons and brothers who gave their lives for the safety of their home. Human wits and human understanding are unable to reach to the extreme and last questions in this struggle of nations, which has unveiled all the terrors of earthly life, but also the grandeur of human courage and human will in ways never seen before. God will be the judge. We can proceed upon our way.

Peace Note of Germany and Her Allies, December 12, 1916²

The most terrific war experienced in history has been raging for the last two years and a half over a large part of the world—a catastrophe which thousands of years of common civilization was unable to prevent and which injures the most precious achievements of humanity.

Our aims are not to shatter nor annihilate our adversaries. In spite of our consciousness of our military and economic strength and our readiness to continue the war (which has been forced upon us) to the bitter end, if necessary; at the same time, prompted by the desire to avoid further bloodshed and make an end to the atrocities of war, the four allied powers propose to enter forthwith into peace negotiations.

The propositions which they bring forward for such negotiations, and which have for their object a guarantee of the existence, of the honor and liberty of evolution for their nations, are, according to their

¹See *infra*.

²*The New York Times*, December 13, 1916.

firm belief, an appropriate basis for the establishment of a lasting peace.

The four allied powers have been obliged to take up arms to defend justice and the liberty of national evolution. The glorious deeds of our armies have in no way altered their purpose. We always maintained the firm belief that our own rights and justified claims in no way control the rights of these nations.

The spiritual and material progress which were the pride of Europe at the beginning of the twentieth century are threatened with ruin. Germany and her allies, Austria-Hungary, Bulgaria, and Turkey, gave proof of their unconquerable strength in this struggle. They gained gigantic advantages over adversaries superior in number and war material. Our lines stand unshaken against ever-repeated attempts made by armies.

The last attack in the Balkans has been rapidly and victoriously overcome. The most recent events have demonstrated that further continuance of the war will not result in breaking the resistance of our forces, and the whole situation with regard to our troops justifies our expectation of further successes.

If, in spite of this offer of peace and reconciliation, the struggle should go on, the four allied powers are resolved to continue to a victorious end, but they solemnly disclaim responsibility for this before humanity and history. The Imperial Government, through the good offices of your Excellency, asks the Government of [here is inserted the name of the neutral power addressed in each instance] to bring this communication to the knowledge of the Government of [here are inserted the names of the belligerents].

Note of the German Government to the Vatican regarding the Peace Proposals, December 12, 1916¹

According to instructions received, I have the honor to send to your Eminence a copy of the declaration of the Imperial Government to-day, which, by the good offices of the powers intrusted with the protection of German interests in the countries with which the German Empire is in a state of war, transmits to these States, and in which the Imperial Government declares itself ready to enter into peace negotiations. The Austro-Hungarian, Turkish, and Bulgarian Governments also have sent similar notes.

¹*The New York Times*, December 13, 1916.

The reasons which prompted Germany and her allies to take this step are manifest. For two years and a half a terrible war has been devastating the European Continent. Unlimited treasures of civilization have been destroyed. Extensive areas have been soaked with blood. Millions of brave soldiers have fallen in battle and millions have returned home as invalids. Grief and sorrow fill almost every house.

Not only upon the belligerent nations, but also upon neutrals, the destructive consequences of the gigantic struggle weigh heavily. Trade and commerce, carefully built up in years of peace, have been depressed. The best forces of the nation have been withdrawn from the production of useful objects. Europe, which formerly was devoted to the propagation of religion and civilization, which was trying to find solutions for social problems, and was the home of science and art and all peaceful labor, now resembles an immense war camp, in which the achievements and works of many decades are doomed to annihilation.

Germany is carrying on a war of defence against her enemies, which aim at her destruction. She fights to assure the integrity of her frontiers and the liberty of the German Nation, for the right which she claims to develop freely her intellectual and economic energies in peaceful competition and on an equal footing with other nations. All the efforts of their enemies are unable to shatter the heroic armies of the (Teutonic) allies, which protect the frontiers of their countries, strengthened by the certainty that the enemy shall never pierce the iron wall.

Those fighting on the front know that they are supported by the whole nation, which is inspired by love for its country and is ready for the greatest sacrifices and determined to defend to the last extremity the inherited treasure of intellectual and economic work and the social organization and sacred soil of the country.

Certain of our own strength, but realizing Europe's sad future if the war continues; seized with pity in the face of the unspeakable misery of humanity, the German Empire, in accord with her allies, solemnly repeats what the Chancellor already has declared, a year ago, that Germany is ready to give peace to the world by setting before the whole world the question whether or not it is possible to find a basis for an understanding.

Since the first day of the Pontifical reign his Holiness the Pope has unswervingly demonstrated, in the most generous fashion, his solicitude

for the innumerable victims of this war. He has alleviated the sufferings and ameliorated the fate of thousands of men injured by this catastrophe. Inspired by the exalted ideas of his ministry, his Holiness has seized every opportunity in the interests of humanity to end so sanguinary a war.

The Imperial Government is firmly confident that the initiative of the four powers will find friendly welcome on the part of his Holiness, and that the work of peace can count upon the precious support of the Holy See.

**Austrian Official Statement regarding the Peace Proposals,
December 12, 1916¹**

When in the summer of 1914 the patience of Austria-Hungary was exhausted by a series of systematically-continued and ever-increasing provocations and menaces, and the monarchy, after almost fifty years of unbroken peace, found itself compelled to draw the sword, this weighty decision was animated neither by aggressive purposes nor by designs of conquest, but solely by the bitter necessity of self-defense, to defend its existence and safeguard itself for the future against similar treacherous plots of hostile neighbors.

That was the task and aim of the monarchy in the present war. In combination with its allies, well tried in loyal comradeship in arms, the Austro-Hungarian army and fleet, fighting, bleeding, but also assailing and conquering, gained such successes that they frustrated the intentions of the enemy. The Quadruple Alliance not only has won an immense series of victories, but also holds in its power extensive hostile territories. Unbroken is its strength, as our latest treacherous enemy has just experienced.

Can our enemies hope to conquer or shatter this alliance of powers? They will never succeed in breaking it by blockade and starvation measures. Their war aims, to the attainment of which they have come no nearer in the third year of the war, will in the future be proved to have been completely unattainable. Useless and unavailing, therefore, is the prosecution of the fighting on the part of the enemy.

The powers of the Quadruple Alliance, on the other hand, have effectively pursued their aims, namely, defence against attacks on their existence and integrity, which were planned in concert long since, and

¹*The New York Times*, December 13, 1916.

the achievement of real guarantees, and they will never allow themselves to be deprived of the basis of their existence, which they have secured by advantages won.

The continuation of the murderous war, in which the enemy can destroy much, but can not—as the Quadruple Alliance is firmly confident—alter fate, is ever more seen to be an aimless destruction of human lives and property, an act of inhumanity justified by no necessity and a crime against civilization.

This conviction, and the hope that similar views may also be begun to be entertained in the enemy camp, has caused the idea to ripen in the Vienna Cabinet—in full agreement with the Governments of the allied (Teutonic) powers—of making a candid and loyal endeavor to come to a discussion with their enemies for the purpose of paving a way for peace.

The Governments of Austria-Hungary, Germany, Turkey, and Bulgaria have addressed to-day identical notes to the diplomatic representatives in the capitals concerned who are intrusted with the promotion of enemy nationals, expressing an inclination to enter into peace negotiations and requesting them to transmit this overture to enemy States. This step was simultaneously brought to the knowledge of the representatives of the Holy See in a special note, and the active interest of the Pope for this offer of peace was solicited. Likewise the accredited representatives of the remaining neutral States in the four capitals were acquainted with this proceeding for the purpose of informing their Governments.

Austria and her allies by this step have given new and decisive proof of their love of peace. It is now for their enemies to make known their views before the world.

Whatever the result of its proposal may be, no responsibility can fall on the Quadruple Alliance, even before the judgment seat of its own peoples, if it is eventually obliged to continue the war.

Extracts from the Speech of Premier Briand in the French Chamber of Deputies, December 13, 1916¹

[TRANSLATION]

It is after proclaiming her victory on every front that Germany,

¹France: *Journal Officiel du 14 décembre 1916, Chambre—Séance du 13 décembre*, p. 3638.

feeling that she can not win, throws out to us certain phrases about which I can not refrain from making a few remarks.

You have read the speech of Mr. von Bethmann-Hollweg, the Chancellor of the German Empire. On this speech, of which I have not yet received the official text, I can not express myself officially. These so-called proposals have not yet been presented to any of the Governments, and it is rather doubtful whether, under existing conditions, those who have been asked to act as intermediaries will accept so delicate a task, which may disturb many a conscience.

On this as on all matters I cannot express an official opinion until we and our Allies have thoroughly considered and discussed the question, and reached a full and complete agreement. But I have the right, indeed the duty, to warn you against this possible poisoning of our country.

When I see Germany arming herself to the teeth, mobilizing her entire civil population at the risk of destroying her commerce and her industries, of breaking up her homes of which she is so proud; when I see the fires of all her factories burning red in the manufacture of war material; when I see her, in contravention of the law of nations, conscripting men in their own countries and forcing them to work for her, if I did not warn my country, I should be culpable indeed!

Observe, gentlemen, that what they are sending us from over there is an invitation to discuss peace. It is extended to us under conditions that are well known to you: Belgium invaded, Serbia invaded, Roumania invaded, ten of our Departments invaded! This invitation is in vague and obscure terms, in high-sounding words to mislead the minds, to stir the conscience, and to trouble the hearts of peoples who mourn for their countless dead. Gentlemen, this is a crucial moment. I discern in these declarations the same cry of conscience, ever striving to deceive neutrals and perhaps also to blind the eyes of those among the German people whose vision is still unimpaired. "It was not we," say these declarations, "who let loose this horrible war."

There is one cry constantly on German lips: "We were attacked; we are defending ourselves; we are the victims!" To this cry I make answer for the hundredth time: "No; you are the aggressors; no matter what you may say, the facts are there to prove it. The blood is on your heads, not on ours."

Furthermore, the circumstances in which these proposals are made are such that I have the right to denounce them as a crafty move, a clumsy snare. When, after reading words like the following, "We wish to give to our peoples every liberty they need, every opportunity

to live and to prosper that they may desire," I note in the same document that what our enemies so generously offer to other nations is a sort of charitable promise not to crush them, not to annihilate them, I exclaim: "Is that what they dare to offer, after the Marne, after the Yser, after Verdun, to France who stands before them glorious in her strength?"

We must think over a document like that; we must consider what it represents at the moment it is thrown at the world and what its aim is.

The things I am telling you are merely my personal impressions. I would not be talking thus, were it not my duty to put my country on her guard against what might bring about her demoralization. It is not that I doubt her clear-sightedness or her perspicacity. I am quite sure that she will not allow herself to be duped. But, nevertheless, even before the proposals are officially laid before us, I have the right to say to you that they are merely a ruse, an attempt to weaken the bonds of our alliance, to trouble the conscience and to undermine the courage of our people.

Therefore, gentlemen, with apologies for having spoken at such length—but you will not reproach me for having taken up this question—I conclude with the statement that the French Republic will do no less now than did the Convention, under similar circumstances, at an earlier period of our history.

Russian semi-official Statement regarding the German Peace Proposals, December 14, 1916¹

The new appeal of our enemies is not their first attempt to throw the responsibilities of the war, which they have let loose, upon the Entente Powers. In order to obtain the support of the German people, who are tired of the war, the Berlin Government has many times had recourse to fallacious words of peace, and has frequently, in order to animate its troops, offered prospects of early peace. It had already promised peace when Warsaw was taken and Serbia was conquered, forgetting that such promises, if unfulfilled, would create profound distrust.

In its further efforts, which were similar and due to the same interested considerations, the German Government was obliged to carry this question outside Germany, and all the world recalls these attempts,

¹*The Times*, London, December 15, 1916.

notably its *ballons d'essai* which were sent up in neutral countries, particularly the United States. Seeing the inanity of such methods, which deceived no one, Germany attempted to create a peace atmosphere which would allow her to consolidate her aggressive and Imperialist tendencies, while sowing discord between the Allies, by seeking to make public opinion believe that separate *pourparlers* were in progress between her and the Entente Powers.

That was the period of the persistent reports of a separate peace. Seeing, however, that the Allies rejected with strong unanimity all these attempts, our enemies had to think of a more serious plan. They are to-day making, in spite of their confidence in their military and economic power, an appeal to the United States, Spain, and Switzerland, announcing their anxiety to enter into negotiations for peace.

The lack of sincerity and the object of the German proposal are evident. The enemy Governments have need of heroic measures to complete the gaps in their armies. The German Government, in order to lift up the hearts of its people and to prepare it for fresh sacrifices, is striving to create a favourable atmosphere with the following thesis:—"We are struggling for our existence. We are proposing peace. It is refused us. Therefore, the responsibility for the continuation of the war falls upon our enemies."

The object pursued by Germany is, however, clear. She speaks of respect for the rights of other nations, but at the same time she has already introduced in Belgium, Serbia, Montenegro, and Poland a regime of terror and violence. As for the future, Germany has proclaimed the illusory independence of Poland, she proposes to divide Serbia between Bulgaria and Austria, economically to subjugate Belgium, and to cede to Bulgaria part of Roumanian territory. Everywhere the idea of the hegemony of Germany predominates, and the latest speeches of Herr von Bethmann-Hollweg show up the true aspirations of the German Government.

But to-day, when the Entente Powers have proclaimed their unshakable determination to continue the war to a successful end and to prevent Germany from establishing her hegemony, no favourable ground exists for peace negotiations. Our enemies knew of the speeches of Mr. Lloyd George, M. Briand, Signor Boselli, and the statement of M. Trepoff. They were therefore sure that their proposal was unacceptable. It is so not because the Entente Powers, the friends of peace, are not inclined that way, but because the peace offered by Germany is a snare for public opinion. That is why the enemy Governments carefully avoid mentioning the conditions of peace.

We are sure that this new enterprise of the disturbers of the peace will lead no one astray, and that it is condemned to failure like previous efforts. The Entente Powers would assume a terrible responsibility before their peoples, before all humanity, if they suspended the struggle against Germany's latest attempt to profit by the present situation to implant her hegemony in Europe. All the innumerable sacrifices of the Allies would be nullified by a premature peace with an enemy who is exhausted but not yet brought down.

The firm determination of the Entente Powers to continue the war to final triumph can be weakened by no illusory proposals of the enemy.

Extract from the Speech of Nicolas Pokrovsky, Russian Minister for Foreign Affairs, in the Duma, December 15, 1916¹

I am addressing you immediately on having been appointed to the post of Minister for Foreign Affairs, and am, naturally, not in a position to give you a detailed statement on the political situation of the day. But I feel constrained to inform you without delay and with the supreme authorization of his Imperial Majesty of the attitude of the Russian Government with regard to the application of our enemies, of which you heard yesterday through the telegrams of the news agencies.

Words of peace coming from the side which bears the whole burden of responsibility for the world conflagration, which it started, and which is unparalleled in the annals of history, however far back one may go, were no surprise to the Allies. In the course of the two and a half years that the war has lasted Germany has more than once mentioned peace. She spoke of it to her armies and to her people each time she entered upon a military operation which was to prove "decisive." After each military success, calculated with a view to creating an impression, she put out feelers for a separate peace on one side and another and conducted an active propaganda in the neutral Press. All these German efforts met with the calm and determined resistance of the Allied Powers.

Now, seeing that she is powerless to make a breach in our unshakable alliance, Germany makes an official proposal to open peace negotiations. In order properly to appreciate the meaning of this proposal one must consider its intrinsic worth and the circumstances

¹*The Times*, London, December 16, 1916.

in which it was made. In substance the German proposal contains no tangible indications regarding the nature of the peace which is desired. It repeats the antiquated legend that the war was forced upon the Central Powers, it speaks of the victorious Austro-German armies, and the irresistibility of their defence, and then, proposing the opening of peace negotiations, the Central Powers express the conviction that the offers which they have to make will guarantee the existence, honour, and free development of their own peoples, and are calculated to establish a lasting peace. That is all the communication contains, except a threat to continue the war to a victorious end, and, in the case of refusal, to throw the responsibility for the further spilling of blood on our Allies.

What are the circumstances in which the German proposal was made? The enemy armies devastated and occupy Belgium, Serbia and Montenegro, and a part of France, Russia and Roumania. The Austro-Germans have just proclaimed the illusory independence of a part of Poland, and are by this trying to lay hands on the entire Polish nation. Who, then, with the exception of Germany, could derive any advantage under such conditions by the opening of peace negotiations?

But the motives of the German step will be shown more clearly in relief if one takes into consideration the domestic conditions of our enemies. Without speaking of the unlawful attempts of the Germans to force the population of Russian Poland to take arms against its own country, it will suffice to mention the introduction of general forced labour in Germany to understand how hard is the situation of our enemies. To attempt at the last moment to profit by their fleeting territorial conquests before their domestic weakness was revealed—that was the real meaning of the German proposal. In the event of failure they will exploit at home the refusal of the Allies to accept peace in order to rehabilitate the tottering morale of their populations.

But there is another senseless motive for the step they have taken. Failing to understand the true spirit which animates Russia, our enemies deceive themselves with the vain hope that they will find among us men cowardly enough to allow themselves to be deceived if even for a moment by lying proposals. That will not be. No Russian heart will yield. On the contrary, the whole of Russia will rally all the more closely round its august Sovereign, who declared at the very beginning of the war that he “would not make peace until the last enemy soldier had left our country.”

Russia will apply herself with more energy than ever to the realization of the aims proclaimed before you on the day when you reassembled, especially to the positive and general collaboration which constitutes the only sure means of arriving at the end which we all have at heart—namely, the crushing of the enemy. The Russian Government repudiates with indignation the mere idea of suspending the struggle and thereby permitting Germany to take advantage of the last chance she will have of subjecting Europe to her hegemony. All the innumerable sacrifices already made would be in vain if a premature peace were concluded with an enemy whose forces have been shaken, but not broken, an enemy who is seeking a breathing space by making deceitful offers of a permanent peace. In this inflexible decision, Russia is in complete agreement with all her valiant Allies. We are all equally convinced of the vital necessity of carrying on the war to a victorious end, and no subterfuge by our enemies will prevent us from following this path.

Resolution of the Russian Duma against acceptance of the German Peace Proposals, December 15, 1916¹

The Duma having heard the statement of the Minister for Foreign Affairs is unanimously in favour of a categorical refusal by the Allied Governments to enter under present conditions into any peace negotiations whatever. It considers that the German proposals are nothing more than a fresh proof of the weakness of the enemy, and are a hypocritical act from which the enemy expects no real success, but by which he seeks to throw upon others the responsibility for the war and for what has happened during it, and to exculpate itself before public opinion in Germany.

The Duma considers that a premature peace would not only be a brief period of calm, but would involve the danger of another bloody war and renewed deplorable sacrifices on the part of the people.

It considers that a lasting peace will be possible only after a decisive victory over the military power of the enemy, and after the definite renunciation by Germany of the aspirations which render her responsible for the world war and for the horrors by which it is accompanied.

¹*The Times*, London, December 16, 1916.

Speech of Arthur Henderson, unofficial Member of the British Cabinet, London, December 16, 1916¹

The British people, with their national love of peace, were anxious that the real meaning of the German proposals should be appreciated. But the Government knew nothing concerning the text of the proposals, and Germany's motives must for the present remain a matter of speculation. But, judging from past and from recent events, we might anticipate, without over-assumption, that any proposals Germany might put forward would not err on the side of magnanimity.

Any proposals put forward must be examined with the greatest possible care. We of all people must not forget that Germany was prepared for peace with this country as late as August, 1914. But on what conditions? That we were prepared to betray France and acquiesce in the violation of the neutrality of Belgium, which Germany, like ourselves, had on oath sworn to maintain. The lesson to be learned from her present desire for peace was that any proposal received must be scrutinized in the light of our obligations to our Allies, to whom we were pledged to make no separate peace. However convenient it might be for Germany to ignore her responsibility in this great war, however far she might ignore her responsibilities to small nationalities, it was loyalty on our part to our brave and loyal comrades that must bind us to the end.

Subject to these considerations, the people of this country were prepared to-day, as in August, 1914, to accept peace, provided that that peace was both just and permanent. But there was one supreme condition—namely, that the principles governing any decision must be those on which we entered, and on which we were continuing, the war. We entered the war in defence of small nationalities, to defend France from wanton aggression, and to preserve our own security. Indemnity for the past was not enough unless we had guarantees for the future; and guarantees for the future were not enough without ample reparation for all that Belgium, France, Serbia and Poland had suffered. The peace into which we entered must contain guarantees for its own duration. Germany might have such a peace if she furnished us with proof of her good intentions.

But, he concluded, if her present overtures are merely a pretence; if it is shown that she is merely arranging an armistice, to enable her to obtain a breathing-space that will furnish her with the opportunity to lay fresh plans of aggression, then I say, whatever may be the temp-

¹*The Times*, London, December 16, 1916.

tation to the people of these islands, we must set our faces like the steel you work upon against her proposals.

Extract from the Speech of Baron Sonnino, Italian Minister for Foreign Affairs, in the Chamber of Deputies, December 18, 1916¹

The Government knows absolutely nothing regarding the specific conditions of the enemy's peace proposals and regards as an enemy manoeuvre the rumours secretly spread about them. We must remember that none of the Allies could in any way take into consideration any condition offered to it separately. The reply of the Allies will be published as soon as it has been agreed upon.

We all desire a lasting peace, but we consider as such an ordered settlement of which the duration does not depend upon the strength of the chains binding one people to another, but on a just equilibrium between States and respect for the principle of nationality, the rights of nations, and reasons of humanity and civilization. While intensifying our efforts to beat the enemy, we do not aim at an international settlement by servitude and predominance implying the annihilation of peoples and nations. If a serious proposal was made on a solid basis for negotiations satisfying the general demands of justice and civilization, no one would oppose an *a priori* refusal to treat, but many things indicate that that is not the case now. The tone of boasting and insincerity characterizing the preamble to the enemy notes inspires no confidence in the proposals of the Central Empires. The Governments of the Allies must avoid the creation for their populations by a false mirage of vain negotiations of an enormous deception, followed by cruel disappointment.

¹*The Times*, London, December 19, 1916.

President Wilson's Peace Note, December 18, 1916¹

The Secretary of State to Ambassador W. H. Page²

[TELEGRAM]

DEPARTMENT OF STATE,
Washington, December 18, 1916.

The President directs me to send you the following communication to be presented immediately to the Minister of Foreign Affairs of the Government to which you are accredited:

"The President of the United States has instructed me to suggest to His Majesty's Government a course of action with regard to the present war which he hopes that the British Government will take under consideration as suggested in the most friendly spirit and as coming not only from a friend but also as coming from the representative of a neutral nation whose interests have been most seriously affected by the war and whose concern for its early conclusion arises out of a manifest necessity to determine how best to safeguard those interests if the war is to continue.

"The suggestion which I am instructed to make the President has long had it in mind to offer. He is somewhat embarrassed to offer it at this particular time because it may now seem to have been prompted by the recent overtures of the Central Powers. It is in fact in no way associated with them in its origin and the President would have delayed offering it until those overtures had been answered but for the fact that it also concerns the question of peace and may best be considered in connection with other proposals which have the same end in view. The President can only beg that his suggestion be considered entirely on its own merits and as if it had been made in other circumstances.³

¹Official prints of the Department of State.

²Same *mutatis mutandis* to the American Diplomatic Representatives accredited to all the belligerent Governments and to all neutral Governments for their information.

³In the note addressed to the Representatives of the Central Powers, this paragraph reads as follows:

"The suggestion which I am instructed to make the President has long had it in mind to offer. He is somewhat embarrassed to offer it at this particular time because it may now seem to have been prompted by a desire to play a part in connection with the recent overtures of the Central Powers. It has in fact been in no way suggested by them in its origin and the President would have delayed offering it until those overtures had been independently answered but for the fact that it also concerns the question of peace and may best be considered in connection with other proposals which have the same end in view. The President can only beg that his suggestion be considered entirely on its own merits and as if it had been made in other circumstances."

"The President suggests that an early occasion be sought to call out from all the nations now at war such an avowal of their respective views as to the terms upon which the war might be concluded and the arrangements which would be deemed satisfactory as a guaranty against its renewal or the kindling of any similar conflict in the future as would make it possible frankly to compare them. He is indifferent as to the means taken to accomplish this. He would be happy himself to serve or even to take the initiative in its accomplishment in any way that might prove acceptable, but he has no desire to determine the method or the instrumentality. One way will be as acceptable to him as another if only the great object he has in mind be attained.

"He takes the liberty of calling attention to the fact that the objects which the statesmen of the belligerents on both sides have in mind in this war are virtually the same, as stated in general terms to their own people and to the world. Each side desires to make the rights and privileges of weak peoples and small States as secure against aggression or denial in the future as the rights and privileges of the great and powerful States now at war. Each wishes itself to be made secure in the future, along with all other nations and peoples, against the recurrence of wars like this and against aggression of selfish interference of any kind. Each would be jealous of the formation of any more rival leagues to preserve an uncertain balance of power amidst multiplying suspicions; but each is ready to consider the formation of a league of nations to insure peace and justice throughout the world. Before that final step can be taken, however, each deems it necessary first to settle the issues of the present war upon terms which will certainly safeguard the independence, the territorial integrity, and the political and commercial freedom of the nations involved.

"In the measures to be taken to secure the future peace of the world the people and Government of the United States are as vitally and as directly interested as the Governments now at war. Their interest, moreover, in the means to be adopted to relieve the smaller and weaker peoples of the world of the peril of wrong and violence is as quick and ardent as that of any other people or Government. They stand ready, and even eager, to coöperate in the accomplishment of these ends, when the war is over, with every influence and resource at their command. But the war must first be concluded. The terms upon which it is to be concluded they are not at liberty to suggest; but the President does feel that it is his right and his duty to point out their intimate interest in its conclusion, lest it should presently be too late to accomplish the greater things which lie beyond its con-

clusion, lest the situation of neutral nations, now exceedingly hard to endure, be rendered altogether intolerable, and lest, more than all, an injury be done civilization itself which can never be atoned for or repaired.

"The President therefore feels altogether justified in suggesting an immediate opportunity for a comparison of views as to the terms which must precede those ultimate arrangements for the peace of the world, which all desire and in which the neutral nations as well as those at war are ready to play their full responsible part. If the contest must continue to proceed towards undefined ends by slow attrition until the one group of belligerents or the other is exhausted, if million after million of human lives must continue to be offered up until on the one side or the other there are no more to offer, if resentments must be kindled that can never cool and despairs engendered from which there can be no recovery, hopes of peace and of the willing concert of free peoples will be rendered vain and idle.

"The life of the entire world has been profoundly affected. Every part of the great family of mankind has felt the burden and terror of this unprecedented contest of arms. No nation in the civilized world can be said in truth to stand outside its influence or to be safe against its disturbing effects. And yet the concrete objects for which it is being waged have never been definitively stated.

"The leaders of the several belligerents have, as has been said, stated those objects in general terms. But, stated in general terms, they seem the same on both sides. Never yet have the authoritative spokesmen of either side avowed the precise objects which would, if attained, satisfy them and their people that the war had been fought out. The world has been left to conjecture what definitive results, what actual exchange of guarantees, what political or territorial changes or readjustments, what stage of military success even, would bring the war to an end.

"It may be that peace is nearer than we know; that the terms which the belligerents on the one side and on the other would deem it necessary to insist upon are not so irreconcilable as some have feared; that an interchange of views would clear the way at least for conference and make the permanent concord of the nations a hope of the immediate future, a concert of nations immediately practicable.

"The President is not proposing peace; he is not even offering mediation. He is merely proposing that soundings be taken in order that we may learn, the neutral nations with the belligerent, how near

the haven of peace may be for which all mankind longs with an intense and increasing longing. He believes that the spirit in which he speaks and the objects which he seeks will be understood by all concerned, and he confidently hopes for a response which will bring a new light into the affairs of the world."

LANSING.

**Extracts from the Speech of Lord Curzon in the House of Lords,
December 19, 1916¹**

I hope I shall not be wrong if I state my belief that the friendly welcome which has been accorded to the present Government, not least by your Lordships, has been due to the conviction that a greater and more concentrated effort, more effective and universal organisation, a more and adequate and rapid use of the resources not only of ourselves alone, but of our Allies, are required if we are to carry the war to the successful termination we all desire. This country is not merely willing to be led, but is almost calling to be driven. They desire the vigorous prosecution of the war, a sufficient and ample return for all the sacrifices they have made, reparation by the enemy for his countless and inconceivable crimes, security that those crimes shall not be repeated, and that those sacrifices shall not have been made in vain. They desire that the peace of Europe shall be re-established on the basis of a free and independent existence of nations great and small. They desire as regards ourselves that our own country shall be free from the menace which the triumph of German arms, and still more the triumph of the German spirit, would entail. It is to carry out these intentions that the present Government has come into existence, and by its success or failure in doing so will it be judged.

At the very moment when she is talking of peace Germany is making the most stupendous efforts for the prosecution of the war, and to find new men. She is squeezing possibly the last drop out of the manhood of her nation. She is compelling every man, woman, and boy, between sixteen and sixty, to enter the service of the State. At the same time, with a callous ferocity and disregard of international law, she is driving the population of the territory she has occupied into compulsory service. She is even trying to get an army out of Poland by offering it the illusory boon of "independence." That is the nature of the challenge we have to meet. It has been our object to establish such a system of re-

¹*The Morning Post*, London, December 20, 1916.

cruiting as will ensure that no man is taken for the Army who is capable of rendering more useful service in industry. We ought to have power to see that every man who is not taken into the Army is employed on national work. At present it is only on men fit for military service the nation has the right to call. Unfit men, exempted men, are surely under the same moral obligation. We need to make a swift and effective answer to Germany's latest move, and in my opinion it is not too much to ask the people of this country to take upon themselves in a few months and as free men the obligations which Germany is imposing on herself. As our Army grows our need of munitions grows. A large part of our labour for munition purposes is at present immobile, and we have no power to transfer men from where they are wasting their strength to places where they can be of great service. We have not the organisation for transferring them as volunteers. These are the powers we must take, and this is the organisation we must complete. The matter is not new. It was considered by the War Committee of the late Government and others, and it was decided that the time had come for the adoption of universal national service. It was one of the first matters taken up by the present Government.

Having dealt so far with the domestic programme of the Government I will now refer to the military and political situations. While I do not believe in painting too rosy a picture of affairs, I think we ought not to take a gloomy view. It is true that Germany has captured the capital of Roumania, but your Lordships must not imagine that she has gained all the success even in Roumania that the words of the Imperial Chancellor would appear to suggest. It may be a consolation to your Lordships to know that the oil refineries and stocks in that part of Roumania which is now in the occupation of the Germans were destroyed before the arrival of the Germans. It would be invidious if I were to discuss the cause of Roumania's failure. It is one of the tragic incidents of the war. The only military Power which could come to the assistance of Roumania was Russia. Russia has done all in her power. The utmost we could do was to send supplies, as we did, and to engage the common enemy by an active offensive from our military base at Salonica. What changes have taken place in the external aspect of the war during the present year?

I distrust statistics, at any rate, in casualties in war, nor do I attach too much importance to the fact that since July 1 the combined armies

of France and England have taken 105,000 German prisoners, 150 heavy guns, 200 field guns, and 15,000 machine guns. There have been much more important consequences than this. The Allies have established an incontestable superiority not merely in the fighting strength and stamina of their men, but in artillery and the air. It is clear that the morale of the Germans is greatly shaken and that their forces are sick of it. Evidence is accumulating of the bad interior condition of Germany, in some cases the admitted hunger and in some cases almost starvation, and the progressive physical deterioration of her people. The outlook is not quite so good for the Central Powers as they would have us believe, and our attitude need not be one of despondency or alarm. It is at this moment that Germany has come forward with offers of peace, or rather I can not fairly use the word offer, but rather let me say vague adumbrations and indications of peace. What has been the course of events? First there has been the speech of the Imperial Chancellor in the Reichstag. Next there is the note to the Powers. The note proclaims the indestructible strength of the Central Powers and proclaims that Germany is not only undefeated, but undefeatable. It advances the plea that Germany was constrained to take up arms for the defence of her existence. It avows German respect for the rights of other nations—and expresses a desire to stem the flood of blood, and finally, after this remarkable preamble, it declares that they propose to enter even now, in the hour of their triumph, they propose, as an act of condescension, to enter into peace negotiations. As regards peace, is there a single one of the Allied Powers who would not welcome peace if it is to be a genuine peace, a lasting peace, a peace that could be secured on honorable terms, a peace that would give guarantees for the future? Is there a single Government, statesman, or individual who does not wish to put an end to this conflict, which is turning half the world into a hell and wrecking the brightest prospects of mankind? In what spirit is it proposed and from whom does it come?

Is this the spirit in which your Lordships think that peace proposals should be made? Does it hold out a reasonable prospect of inducing the Allies to lay down their arms? Is there any indication of German desire to make reparation and to give guarantees for the future? So far as we can judge from that speech, and it is all we have to judge by, the spirit which breathes in every word is the spirit of German militarism. While that speech is being made Belgian deportation is going on. It is said that the "peace of God passeth understanding." Surely the

same thing can be said in a different sense of the peace which Germany proposes. We know nothing of that. We have only the menacing tone of the note and the speech which accompanied it. Let me put one more reflection before you. Let no one think for a moment that it is merely by territorial restitution or by reversion to the *status quo ante* that the objects for which the Allies are fighting will be obtained. We are fighting, it is true, to recover for Belgium, France, Russia, Serbia, and Roumania the territories which they have lost, and to secure reparation for the cruel wrongs they have experienced. But you may restore to them all, and more than all, they have lost, you may pile on indemnities which no treasury in Europe could produce, and yet the war would have been in vain if we had no guarantees and no securities against a repetition of Germany's offense. We are not fighting to destroy Germany. Such an idea has never entered into the mind of any thinking human being in this country. But we are fighting to secure that the German spirit shall not crush the free progress of nations and that the armed strength of Germany, augmented and fortified, shall not dominate the future. We are fighting that our grandchildren and our great-grandchildren shall not have, in days when we have passed away, to go again through the experience of the years 1914 to 1917. This generation has suffered in order that the next may live. We are ready enough for peace when these guarantees have been secured and these objects attained. Till then we owe it to the hundreds of thousands of our fellow-countrymen and our Allies, who have shed their blood for us, to be true to the trust of their splendid and uncomplaining sacrifice and to endure to the end.

Extracts from the Speech of Premier Lloyd George in the House of Commons, December 19, 1916¹

I am afraid I shall have to claim the indulgence of the House in making the observations which I have to make in moving the second reading of this Bill. I am still suffering a little from my throat. I appear before the House of Commons to-day with the most terrible responsibility that can fall upon the shoulders of any living man as the chief adviser of the Crown in the most gigantic war in which this country has ever been engaged, a war upon the events of which its destiny depends. It is the greatest war ever waged. The burdens are the heaviest that have been cast upon this or any other country,

¹*The Times*, London, December 20, 1916.

and the issues which hang on it are the gravest that have been attached to any conflict in which humanity has ever been involved.

The responsibilities of the new Government have been suddenly accentuated by a declaration made by the German Chancellor, and I propose to deal with that at once. The statement made by him in the German Reichstag has been followed by a note presented to us by the United States of America without any note or comment. The answer that will be given by the Government will be given in full accord with all our brave Allies. Naturally there has been an interchange of views, not upon the note, because it has only recently arrived, but upon the speech which propelled it, and, inasmuch as the note itself is practically only a reproduction or certainly a paraphrase of the speech, the subject-matter of the note itself has been discussed informally between the Allies, and I am very glad to be able to state that we have each of us, separately and independently, arrived at identical conclusions. I am very glad that the first answer that was given to the statement of the German Chancellor was given by France and by Russia. They have the unquestioned right to give the first answer to such an invitation. The enemy is still on their soil. Their sacrifices have been greater. The answer they have given has already appeared in all the papers, and I simply stand here to-day on behalf of the Government to give a clear and definite support to the statement which they have already made. Let us examine what the statement is and examine it calmly. Any man or set of men who wantonly or without sufficient cause prolong a terrible conflict like this would have on his soul a crime that oceans could not cleanse. Upon the other hand it is equally true that any man or set of men who from a sense of weariness or despair abandoned the struggle without achieving the high purpose for which he had entered into it would have been guilty of the costliest act of poltroonery ever perpetrated by any statesman. I should like to quote the very well-known words of Abraham Lincoln under similar conditions:—"We accepted this war for an object, a worthy object, and the war will end when that object is attained. Under God I hope it will never end until that time." Are we likely to achieve that object by accepting the invitation of the German Chancellor? That is the only question we have to put to ourselves.

There has been some talk about proposals of peace. What are the proposals? There are none. To enter, on the invitation of Germany, proclaiming herself victorious, without any knowledge of the proposals she proposes to make, into a conference is to put our heads

into a noose with the rope end in the hands of Germany. This country is not altogether without experience in these matters. This is not the first time we have fought a great military despotism that was overshadowing Europe, and it will not be the first time we shall have helped to overthrow military despotism. We have an uncomfortable historical memory of these things, and we can recall when one of the greatest of these despots had a purpose to serve in the working of his nefarious schemes. His favorite device was to appear in the garb of the Angel of Peace, and he usually appeared under two conditions. When he wished for time to assimilate his conquests or to reorganize his forces for fresh conquests, or, secondly, when his subjects showed symptoms of fatigue and war weariness the appeal was always made in the name of humanity. He demanded an end to bloodshed, at which he professed himself to be horrified, but for which he himself was mainly responsible. Our ancestors were taken in once, and bitterly they and Europe rue it. The time was devoted to reorganizing his forces for a deadlier attack than ever upon the liberties of Europe, and examples of that kind cause us to regard this note with a considerable measure of reminiscent disquietude.

We feel that we ought to know, before we can give favourable consideration to such an invitation, that Germany is prepared to accede to the only terms on which it is possible for peace to be obtained and maintained in Europe. What are those terms? They have been repeatedly stated by all the leading statesmen of the Allies. My right hon. friend has stated them repeatedly here and outside, and all I can do is to quote, as my right hon. friend the leader of the House did last week, practically the statement of the terms put forward by my right hon. friend—

“Restitution, reparation, guarantee against repetition”—so that there shall be no mistake, and it is important that there should be no mistake in a matter of life and death to millions.

Let me repeat again—complete restitution, full reparation, effectual guarantee. Did the German Chancellor use a single phrase to indicate that he was prepared to accept such a peace? Was there a hint of restitution, was there any suggestion of reparation, was there any invitation of any security for the future that this outrage on civilization would not be again perpetrated at the first profitable opportunity? The very substance and style of this speech constitutes a denial of peace on the only terms on which peace is possible. He is not even conscious now that Germany has committed any offence against the rights of free nations. Listen to this from

the note:—"Not for an instant have they (they being the Central Powers) swerved from the conviction that respect of the rights of other nations is not in any degree incompatible with their own rights and legitimate interests." When did they discover that? Where was the respect for the rights of other nations in Belgium and Serbia? That was self-defence! Menaced, I suppose, by the overwhelming armies of Belgium, the Germans had been intimidated into invading Belgium, and the burning of Belgian cities and villages, to the massacring of thousands of inhabitants, old and young, to the carrying of the survivors into bondage. Yea, and they were carrying them into slavery at the very moment when this note was being written about the unswerving conviction as to the respect for the root of the rights of other nations. Are these outrages the legitimate interest of Germany? We must know. That is not the moment for peace. If excuses of this kind for palpable crimes can be put forward two and a half years after the exposure by grim facts of the guarantee, is there, I ask in all solemnity, any guarantee that similar subterfuges will not be used in the future to overthrow any treaty of peace you may enter into with Prussian militarism.

This note and that speech prove that not yet have they learned the very alphabet of respect for the rights of others. Without reparation, peace is impossible. Are all these outrages against humanity on land and on sea to be liquidated by a few pious phrases about humanity? Is there to be no reckoning for them? Are we to grasp the hand that perpetrated these atrocities in friendship without any reparation being tendered or given? I am told that we are to begin, Germany helping us, to exact reparation for all future violence committed after the war. We have begun already. It has already cost us so much, and we must exact it now so as not to leave such a grim inheritance to our children. As much as we all long for peace, deeply as we are horrified with war, this note and the speech which heralded it do not afford us much encouragement and hope for an honourable and lasting peace. What hope is given in that speech that the whole root and cause of this great bitterness, the arrogant spirit of the Prussian military caste, will not be as dominant as ever if we patch up peace now? Why, the very speech in which these peace suggestions are made resound to the boast of Prussian military triumph. It is a long pæan over the victories of von Hindenburg and his legions. The very appeal for peace was delivered ostentatiously from the triumphal chariot of Prussian militarism.

We must keep a steadfast eye upon the purpose for which we entered the war, otherwise the great sacrifices we have been making will be in vain. The German note states that it was for the defence of their existence and the freedom of national development that the Central Powers were constrained to take up arms. Such phrases even deceive those who pen them. They are intended to delude the German nation into supporting the designs of the Prussian military caste. Who ever wished to put an end to their national existence or the freedom of their national development? We welcomed their development as long as it was on the paths of peace—the greater their development upon that road, the greater would all humanity be enriched by their efforts. That was not our desire, and it is not our purpose now.

The Allies entered this war to defend Europe against the aggression of Prussian military domination, and, having begun it, they must insist that the only end is the most complete and effective guarantee against the possibility of that caste ever again disturbing the peace of Europe. Prussia, since she got into the hands of that caste, has been a bad neighbour, arrogant, threatening, bullying, shifting boundaries at her will, taking one fair field after another from weaker neighbours, and adding them to her own domain. With her belt ostentatiously full of weapons of offence, and ready at a moment's notice to use them, she has always been an unpleasant, disturbing neighbour in Europe. She got thoroughly on the nerves of Europe. There was no peace near where she dwelt. It is difficult for those who are fortunate enough to live thousands of miles away to understand what it has meant to those who live near. Even here, with the protection of the broad seas between us, we know what a disturbing factor the Prussians were with their constant naval menace.

But even we can hardly realize what it has meant to France and to Russia. Several times there were threats directed to them even within the lifetime of this generation which presented the alternative of war or humiliation. There were many of us who hoped that internal influences in Germany would have been strong enough to check and ultimately to eliminate these feelings. All our hopes proved illusory, and now that this great war has been forced by the Prussian military leaders upon France, Russia, Italy, and ourselves, it would be folly, it would be a cruel folly, not to see to it that this swashbuckling through the streets of Europe to the disturbance of all harmless and peaceful citizens shall be dealt with now as an offence against the law of nations. The mere word that

led Belgium to her own destruction will not satisfy Europe any more. We all believed it. We all trusted it. It gave way at the first pressure of temptation, and Europe has been plunged into the vortex of blood.

We will therefore wait until we hear what terms and guarantees the German Government offer other than those, better than those, surer than those, which she so lightly broke. Meantime, we shall put our trust in an unbroken Army rather than in a broken faith.

For the moment I do not think it would be advisable for me to add anything upon this particular invitation. A formal reply will be delivered by the Allies in the course of the next few days. I shall therefore proceed with the other part of the task which I have in front of me. What is the urgent task in front of the Government? To complete, and make even more effective, the mobilization of all our national resources—a mobilization which has been going on since the commencement of the war—so as to enable the nation to bear the strain, however prolonged, and to march through to victory, however lengthy, and however exhausted may be the task. It is a gigantic task.

Let me give this word of warning, if there be any who have given their confidence to the new Administration in expectation of a speedy victory, they will be doomed to disappointment. I am not going to paint a gloomy picture of the military situation. If I did it would not be a true picture. But I must paint a stern picture, because that accurately represents the facts.

There is a time in every prolonged and fierce war when in the passion and rage of conflict men forget the high purpose with which they entered it. This is a struggle for international right, international honour, international good faith—the channel along which peace, honour, and good will must flow amongst men. The embankment laboriously built up by generations of men against barbarism has been broken, and had not the might of Britain passed into the breach, Europe would have been inundated with a flood of savagery and unbridled lust of power. The plain sense of fair-play amongst nations, the growth of an international conscience, the protection of the weak against the strong by the stronger, the consciousness that justice has a more powerful backing in this world than greed, the knowledge that any outrage upon fair dealing between nations, great or small, will meet with prompt and meritable chastisement—these constitute the causeway along which humanity

was progressing slowly to higher things. The triumph of pressure would sweep it all away and leave mankind to struggle helpless in the morass. That is why since this war began I have known but one political aim; and for it I have fought with a single eye—that is the rescue of mankind from the most overwhelming catastrophe that has ever yet menaced its well-being.

Extracts from the Speech of Former Premier Asquith in the House of Commons, December 19, 1916¹

I think what I have said is sufficient to show that the use we have made of the methods open to us—naval, military, and economic—has not been ineffectual, and if further proof were required it is to be found in the so-called peace proposals which have been somewhat clumsily projected into space from Berlin. It is true that these proposals are wrapped up in the familiar dialect of Prussian arrogance, but how comes it that a nation which, after two years of war, professes itself conscious of military superiority and confident of ultimate victory should begin to whisper, nay, not to whisper, but to shout so that all the world can hear it, the word “peace”? Is it a sudden access of chivalry? Why and when has the German Chancellor become so acutely sensitive to what he calls the dictates of humanity? No; without being uncharitable we may well look elsewhere for the origin of this pronouncement. It is born of military and economic necessity. When I moved the last Vote of Credit I said there was no one among us who did not yearn for peace, but that it must be an honourable and not a shamefaced peace; it must be a peace that promised to be durable and not a patched-up and precarious compromise; it must be a peace which achieved the purpose for which we entered on the war. Such a peace we would gladly accept. Anything short of it we were bound to repudiate by every obligation of honour, and above all by the debt we owe to those, and especially to the young, who have given their lives for what they and we believed to be a worthy cause. Since I spoke two months ago their ranks have been sadly and steadily reinforced. I should like to refer in passing for a moment to one of them, a friend and colleague of mine, Lord Lucas. Apart from the advantages of birth and fortune he was a man of singularly winning personality, fine intelligence, and with the strongest sense of public duty. He worked inconspicuously but hard in the early days of the Territorial Army. He served for some years at the War Office and afterwards became a member of the Cabinet. At the time of the

¹*The Morning Post*, London, December 20, 1916.

Coalition he stood aside without a murmur and volunteered straight away for the Royal Flying Corps. Now he has met his death in a gallant reconnoitering raid over the German lines. He was not, I think, more than forty. He had a full and fruitful life. Nor can we or ought we forget the countless victims, both among our own people and among the Allies, of the ruthless and organised violation of the humane restrictions by which both on land and sea the necessary horrors of war have been hitherto mitigated. For my own part I say plainly and emphatically that I see nothing in the note of the German Government which gives me the least reason to believe that they are in a mood to give to the Allies what the last time I spoke I declared to be essential—reparation and security.

If they are in the right mood—if they are prepared to give us reparation for the past and security for the future, let them say so. While I was at the head of the Government, on several occasions I indicated, I believe, in quite unambiguous language, the minimum of the Allies' demands, before they put up their swords, as well as the general character of the ultimate international status upon which our hopes and desires are set. I have no longer authority to speak for the Government or the nation, but I do not suppose the House or the country are going back from what I said in their name and on their behalf. It is not we that stand in the way of peace when we decline, as I hope we shall, to enter blindfold into the parleys which start from nothing, and therefore can lead to nothing. Peace we all desire, but peace can only come—peace, I mean, that is worthy the name and that satisfies the definition of the word—peace will only come on the terms that atonement is made for past wrongs, that the weak and the downtrodden are restored, and that the faith of treaties and the sovereignty of public law are securely enthroned over the nations of the world.

Speech of Bonar Law, Chancellor of the Exchequer, in the House of Commons, December 21, 1916¹

The House will readily understand that I am divided between two desires. It is the general desire of the House, I think, that we should rise to-morrow, and if that is to be done it is quite impossible that a subject so vast as that which we have just been discussing can be properly debated to-night. I am going to try to set an example by saying very little indeed on the burning questions which have been

¹*The Times*, London, December 22, 1916.

raised in the course of the debate. In regard to the speech of the hon. member who has just sat down, I at least who have only run vicarious risks have no right to throw taunts at a man who has had his place in the fighting line. At the same time, I am compelled to say that if the spirit of the speech to which we have just listened were to permeate this country, then, in my belief, all the blood and treasure which have been spent in this war will have been spent in vain. I do not think that he or anyone needs to impress upon us what are the horrors of this war.

If there were ever any who love war for itself—I have always hated it—if there were any whose imaginations were moved by the pomp and panoply of war, we know better now what it is. It is not glorious victories, or the hope of them, that is moving the hearts of the people of this country. What we think of is the men—our own nearest relations—who are suffering the hardships which have been pointed out to us. What we are thinking of are the desolate homes to which life will never return again in this world. What we are thinking of are the maimed and wounded whom we see going about our streets. We do not love war, and if I saw any prospect of securing the objects for which we have been fighting by a peace to-morrow, there is no man in this House who would welcome it more gladly than I would.

But what is the position? The hon. gentleman says—I hope no one will think that in quoting his words I have any party view in mind—“Let us trust to the old Liberal traditions; let us trust to the good hearts of those we are dealing with.” Why are we in this war to-day? Why are we suffering the terrible agonies which this nation is enduring? It is because we did trust Germany; because we did believe that the crimes which have been committed by them would never be committed by any human being. It is all very well to say, “Let us get terms of peace.” Can you get any terms of peace more binding than the treaty to protect the neutrality of Belgium? Can you come to any conclusion upon paper or by promise which will give us greater security than we had before this war broke out? Where are we to find them? I hope that not this country alone, but all the neutral nations of the world, will understand the position that has now arisen. Germany has made a proposal of peace. On what basis? On the basis of her victorious army.

The hon. member who spoke last tells us that if we win the victory there will be conscription for ever in this country. But what will be the position if peace is settled on the basis of a victorious German army? Is there any man in this House who has honestly considered not merely the conditions in which this war was forced on

the world, but the way in which the war has been carried on—is there any man in this House who honestly believes that the dangers and miseries from which we have suffered can be cured in any other way than by making the Germans realize that frightfulness does not pay, and that their militarism is not going to rule the world?

I ask the House to realize what it is we are fighting for. We are not fighting for territory; we are not fighting for the greater strength of the nations who are fighting. We are fighting for two things, to put it in a nutshell: We are fighting for peace now, but we are also fighting for security for peace in the time to come. When this German peace proposal comes before us, not only based on German victories, but when they claim that they are acting on humanitarian grounds, when they treat it, to put it at the best, from their point of view, as if they and the Allies were at least equal—let the House consider what has happened in this war. Let them consider the outrages in Belgium, the outrages on sea and land, the massacres in Armenia, which Germany could have stopped at a word, if she had wished to do so.

Let them realize that this war will have been fought in vain, utterly in vain, unless we can make sure that it shall never again be in the power of a single man or of a group of men to plunge the world into miseries such as I have described.

When the hon. gentleman talks about peace on these terms, I ask anyone in this House or in the country this question: Is there to be no reparation for the wrong? Is the peace to come on this basis, that the greatest crime in the world's history is to go absolutely unpunished? It is not vindictiveness to say that. It is my firm belief that unless all the nations of the world can be made to realize that these moral forces of which the hon. gentleman spoke have to be shown in action—unless we realize that, there never can be an enduring peace in this world. I am not afraid of my countrymen. We have been told that the troops at the front will fight to the end, to secure what they think is necessary as a result of this war. I am sure that they will. I am sure also that our fellow countrymen at home who up till now have made few sacrifices, except the sacrifice of those dear to them, are determined in this matter, and that if they can be made to believe, as I am sure they can, that the objects for which we are fighting can be secured, then there is no sacrifice which they will not be prepared to make. I am afraid I have said more than I intended when I rose, but I could not refrain from expressing what I felt on this subject.

Swiss Reply to President Wilson's Peace Note, December 23, 1916¹

The President of the United States of America, with whom the Swiss Federal Council, guided by its warm desire that the hostilities may soon come to an end, has for a considerable time been in touch, had the kindness to apprise the Federal Council of the peace note sent to the Governments of the Central and Entente Powers. In that note President Wilson discusses the great desirability of international agreements for the purpose of avoiding more effectively and permanently the occurrence of catastrophes such as the one under which the peoples are suffering to-day. In this connection he lays particular stress on the necessity for bringing about the end of the present war. Without making peace proposals himself or offering mediation, he confines himself to sounding as to whether mankind may hope to have approached the haven of peace.

The most meritorious personal initiative of President Wilson will find a mighty echo in Switzerland. True to the obligations arising from observing the strictest neutrality, united by the same friendship with the States of both warring groups of powers, situated like an island amidst the seething waves of the terrible world war, with its ideal and material interests most sensibly jeopardized and violated, our country is filled with a deep longing for peace, and ready to assist by its small means to stop the endless sufferings caused by the war and brought before its eyes by daily contact with the interned, the severely wounded, and those expelled, and to establish the foundations for a beneficial cooperation of the peoples.

The Swiss Federal Council is therefore glad to seize the opportunity to support the efforts of the President of the United States. It would consider itself happy if it could act in any, no matter how modest a way, for the *rapprochement* of the peoples now engaged in the struggle, and for reaching a lasting peace.

¹The New York Times, December 25, 1916.

Swiss Peace Note in support of President Wilson, December 23, 1916¹

The President of the United States of America has just addressed to the Governments of the Entente and to the Central Powers a note in favour of peace. He has been good enough to communicate it to the Swiss Federal Council, which, inspired by the ardent desire to see an early cessation of hostilities, got into touch with him as long as five weeks ago.

In this note President Wilson recalls how desirable it is to come to international agreements with a view to avoiding, in a permanent and sure manner, such catastrophes as those which the peoples have to suffer to-day. Before all, he insists upon the necessity of putting an end to the present war. He himself does not formulate peace proposals, nor does he propose his mediation. He limits himself to sounding the belligerents in order to ascertain whether humanity may hope to-day that it has advanced towards a beneficent peace.

The generous personal initiative of President Wilson will not fail to awaken a profound echo in Switzerland. Faithful to the duties which the strictest observation of neutrality imposes upon her, united by the same friendship to the two groups of Powers at present at war, isolated in the midst of the frightful *mêlée* of the peoples, seriously threatened and affected in her spiritual and material interests, our country longs for peace.

Switzerland is ready to aid with all her feeble strength in putting an end to the sufferings of war which she sees being endured every day by the interned, the seriously wounded, and the deported. She, too, is willing to lay the foundations for a fruitful collaboration of the peoples. That is why the Swiss Federal Council seizes with joy the opportunity to support the efforts of the President of the United States of America. She would esteem herself happy if she

¹*The Times*, London, December 26, 1916. Addressed to all the belligerent Governments. Norway, Sweden and Denmark likewise addressed these Governments in support of President Wilson, in an identical note of December 22, 1916, no official text of which is available. These notes were briefly acknowledged by the Entente Allies on January 17, 1917, the four States being referred for fuller reply to the joint note to President Wilson of January 10, 1917. *Ibid.*, January 18, 1917. For the replies of the Central Governments to the Swiss note, see *post*, pp. 36, 37. Germany, on January 1, 1917, briefly acknowledged the Scandinavian note, concluding with the remark: "It depends upon the reply of the Entente whether the attempt to give back to the world the blessings of peace will be crowned with success." *The New York Times*, January 4, 1917. For the Austro-Hungarian reply to the Scandinavian note, see *post*, p. 45.

could, even in the most modest measure, work for the *rapprochement* of the nations at war and the establishment of a lasting peace.

German Reply to President Wilson's Peace Note, December 26, 1916¹

Ambassador Gerard to the Secretary of State

[TELEGRAM—PARAPHRASE]

AMERICAN EMBASSY,
Berlin, December 26, 1916.

Mr. Gerard reports receipt of a note from the German Foreign Office, dated December 26, 1916, as follows:

“FOREIGN OFFICE,
“Berlin, December 26, 1916.

“With reference to the esteemed communication of December 21, Foreign Office No. 15118, the undersigned has the honor to reply as follows: To His Excellency the Ambassador of the United States of America, Mr. James W. Gerard.

“The Imperial Government has accepted and considered in the friendly spirit which is apparent in the communication of the President, noble initiative of the President looking to the creation of bases for the foundation of a lasting peace. The President discloses the aim which lies next to his heart and leaves the choice of the way open. A direct exchange of views appears to the Imperial Government as the most suitable way of arriving at the desired result. The Imperial Government has the honor, therefore, in the sense of its declaration of the 12th instant, which offered the hand for peace negotiations, to propose the speedy assembly, on neutral ground, of delegates of the warring States.

“It is also the view of the Imperial Government that the great work for the prevention of future wars can first be taken up only after the ending of the present conflict of exhaustion. The Imperial Government is ready, when this point has been reached, to cooperate with the United States at this sublime task.

“The undersigned, while permitting himself to have recourse to good offices of His Excellency the Ambassador in connection with the transmission of the above reply to the President of the United

¹Official print of the Department of State.

States, avails himself of this opportunity to renew the assurances of his highest consideration.

“ZIMMERMAN.”

**Austro-Hungarian Reply to President Wilson's Peace Note,
December 26, 1916¹**

Ambassador Penfield to the Secretary of State

[TELEGRAM]

AMERICAN EMBASSY,
Vienna, December 26, 1916.

Following, dated December 26, received to-day from Austro-Hungarian Ministry for Foreign Affairs:

“AIDE MEMOIRE

“In reply to the *aide memoire* communicated on the 22d instant by His Excellency the American Ambassador, containing the proposals of the President of the United States of America for an exchange of views among the powers at present at war for the eventual establishment of peace, the Imperial and Royal Government desires particularly to point out that in considering the noble proposal of the President it is guided by the same spirit of amity and complaisance as finds expression therein.

“The President desires to establish a basis for a lasting peace without wishing to indicate the ways and means. The Imperial and Royal Government considers a direct exchange of views among the belligerents to be the most suitable way of attaining this end. Adverting to its declaration of the 12th instant, in which it announced its readiness to enter into peace negotiations, it now has the honor to propose that representatives of the belligerent powers convene at an early date at some place on neutral ground.

“The Imperial and Royal Government likewise concurs in the opinion of the President that only after the termination of the present war will it be possible to undertake the great and desirable work of the prevention of future wars. At an appropriate time it will be willing to cooperate with the United States of America for the realization of this noble aim.”

PENFIELD.

¹Official print of the Department of State.

**Turkish Reply to President Wilson's Peace Note, December 26,
1916¹**

Ambassador Elkus to the Secretary of State

[TELEGRAM]

AMERICAN EMBASSY,
Constantinople, December 26, 1916.

In reply to the President's message communicated to the Sublime Porte on the 23d instant, Minister for Foreign Affairs handed me to-day a note of which the following is a translation:

"MR. AMBASSADOR: In reply to the note which Your Excellency was pleased to deliver to me under date of the twenty-third instant, number 2107, containing certain suggestions of the President of the United States, I have the honor to communicate to Your Excellency the following:

"The generous initiative of the President, tending to create bases for the reestablishment of peace, has been received and taken into consideration by the Imperial Ottoman Government in the same friendly obliging (?) which manifests itself in the President's communication. The President indicates the object which he has at heart and leaves open the choice of that path leading to this object. The Imperial Government considers a direct exchange of ideas as the most efficacious means of attaining the desired result.

"In conformity with its declaration of the twelfth of this month, in which it stretched forth its hand for peace negotiations, the Imperial Government has the honor of proposing the immediate meeting, in a neutral country, of delegates of the belligerent powers.

"The Imperial Government is likewise of opinion that the great work of preventing future wars can only be commenced after the end of the present struggle between the nations. When this moment shall have arrived the Imperial Government will be pleased [to] collaborate with the United States of America and with the other neutral powers in this sublime task.

"(Signed) HALIL."
ELKUS.

**Austro-Hungarian Reply to the Swiss Peace Note, December 27,
1916²**

[TRANSLATION]

The undersigned, Minister for Foreign Affairs, has had the honor

¹Official print of the Department of State.

²*Le Figaro*, Paris, December 28, 1916.

to receive the esteemed note of December 23d, in which the Minister Plenipotentiary of Switzerland, Dr. Burckhardt, was good enough to communicate to us, under instructions, the desire of the Swiss Federal Council to endorse the initiative taken by the President of the United States with the belligerent Governments for the purpose of ending the present war and of effectively providing against all war in the future.

The noble efforts of President Wilson received a most cordial welcome from the Imperial and Royal Government, to which it gave expression in the note delivered yesterday to the American Ambassador at Vienna, a copy of which is attached hereto with the request that the Minister of Switzerland be good enough to bring this document to the attention of the Swiss Federal Council.

The undersigned, Minister for Foreign Affairs, permits himself to add that the Imperial and Royal Government views the endorsement by the Federal Government of the efforts of President Wilson as the expression of the noble and humanitarian sentiments which Switzerland has manifested since the beginning of the war with regard to all the belligerent Powers and which it has put in practice in so generous and friendly a manner.

German Reply to the Swiss Peace Note, December 28, 1916¹

The Imperial Government has taken note of the fact that the Swiss Federal Council, as a result of its having placed itself in communication some time ago with the President of the United States of America, is also ready to take action side by side with them towards bringing about an understanding between the belligerent nations and towards the attainment of a lasting peace. The spirit of true humanity by which the step of the Swiss Federal Council is inspired is fully appreciated and esteemed by the Imperial Government.

The Imperial Government has informed the President of the United States that a direct exchange of views seems to them to be the most suitable means of obtaining the desired result. Led by the same considerations which caused Germany on December 12 to offer her hand for peace negotiations, the German Government has proposed an immediate meeting of delegates of all the belligerents at a neutral

¹*The Times*, London, December 29, 1916.

place. In agreement with the President of the United States the Imperial Government is of opinion that the great work of preventing future wars can only be taken in hand after the present world war has terminated. As soon as that moment has come they will be joyfully ready to cooperate in this sublime task.

If Switzerland, which, faithful to the country's noble traditions in mitigating the sufferings caused by the present war, has deserved imperishable merit, will also contribute to safeguarding the world's peace, the German nation and Government will highly welcome that.

**Scandinavian Reply to President Wilson's Peace Note,
December 29, 1916¹**

It is with the liveliest interest that the Norwegian Government has learned of the proposals which the President of the United States has just made with the purpose of facilitating measures looking toward the establishment of a durable peace, while at the same time seeking to avoid any interference which could cause offense to legitimate sentiments.

The Norwegian Government would consider itself failing in its duties toward its own people and toward humanity if it did not express its deepest sympathy with all efforts which would contribute to put an end to the ever-increasing suffering and the moral and material losses. It has every hope that the initiative of President Wilson will arrive at a result worthy of the high purpose which inspires it.

**Entente Reply to the Peace Note of Germany and Her Allies,
December 30, 1916²**

The Allied Governments of Russia, France, Great Britain, Japan, Italy, Serbia, Belgium, Montenegro, Portugal and Roumania, united for the defence of the freedom of nations and faithful to their undertakings not to lay down their arms except in common accord, have decided to return a joint answer to the illusory peace proposals which

¹*The New York Times*, December 30, 1916. Identical note of Norway, Sweden and Denmark.

²*The Times*, London, January 1, 1917.

have been addressed to them by the Governments of the enemy Powers through the intermediary of the United States, Spain, Switzerland, and the Netherlands.

As a prelude to any reply, the Allied Powers feel bound to protest strongly against the two material assertions made in the note from the enemy Powers, the one professing to throw upon the Allies the responsibility of the war, and the other proclaiming the victory of the Central Powers.

The Allies can not admit a claim which is thus untrue in each particular, and is sufficient alone to render sterile all attempt at negotiations.

The Allied nations have for 30 months been engaged in [*subissent*—have had to endure] a war which they had done everything to avoid. They have shown by their actions their devotion to peace. This devotion is as strong to-day as it was in 1914; and after the violation by Germany of her solemn engagements, Germany's promise is no sufficient foundation on which to re-establish the peace which she broke.

A mere suggestion, without statement of terms, that negotiations should be opened, is not an offer of peace. The putting forward by the Imperial Government of a sham [*prétendue*—pretended] proposal, lacking all substance and precision, would appear to be less an offer of peace than a war manoeuvre.

It is founded on a calculated misinterpretation of the character of the struggle in the past, the present, and the future.

As for the past, the German note takes no account of the facts, dates, and figures which establish that the war was desired, provoked, and declared by Germany and Austria-Hungary.

At the Hague Conference it was the German delegate who refused all proposals for disarmament. In July, 1914, it was Austria-Hungary who, after having addressed to Serbia an unprecedented ultimatum, declared war upon her in spite of the satisfaction which had at once been accorded. The Central Empires then rejected all attempts made by the Entente to bring about a pacific solution of a purely local conflict. Great Britain suggested a Conference, France proposed an International Commission, the Emperor of Russia asked the German Emperor to go to arbitration, and Russia and Austria-Hungary came to an understanding on the eve of the conflict; but to all these efforts Germany gave neither answer nor effect. Belgium was invaded by an Empire which had guaranteed her neutrality and which has had the assurance to proclaim that treaties were "scraps of paper" and that "necessity knows no law."

At the present moment these sham [*prétendues*—pretended] offers on the part of Germany rest on a "War Map" of Europe alone, which represents nothing more than a superficial and passing phase of the situation, and not the real strength of the belligerents. A peace concluded upon these terms would be only to the advantage of the aggressors, who, after imagining that they would reach their goal in two months, discovered after two years that they could never attain it.

As for the future, the disasters caused by the German declaration of war and the innumerable outrages committed by Germany and her Allies against both belligerents and neutrals demand penalties [*sanctions*—retribution], reparation, and guarantees; Germany avoids the mention of any of these.

In reality these overtures made by the Central Powers are nothing more than a calculated attempt to influence the future course of the war, and to end it by imposing a German peace.

The object of these overtures is to create dissension in public opinion [*troubler l'opinion*—disturb opinion] in allied countries. But that public opinion has, in spite of all the sacrifices endured by the Allies, already given its answer with admirable firmness, and has denounced the empty pretence [*vide*—emptiness] of the declaration of the Enemy Powers.

They have the further object of stiffening public opinion in Germany and in the countries allied to her; one and all, already severely tried by their losses, worn out by economic pressure and crushed by the supreme effort which has been imposed upon their inhabitants.

They endeavour to deceive and intimidate public opinion in neutral countries whose inhabitants have long since made up their minds where the initial responsibility rests, have recognized existing responsibilities, and are far too enlightened to favour the designs of Germany by abandoning the defence of human freedom.

Finally, these overtures attempt to justify in advance in the eyes of the world a new series of crimes—submarine warfares, deportations, forced labour and forced enlistment of inhabitants against their own countries, and violations of neutrality.

Fully conscious of the gravity of this moment, but equally conscious of its requirements, the Allied Governments, closely united to one another and in perfect sympathy with their peoples, refuse to consider a proposal which is empty and insincere.

Once again the Allies declare that no peace is possible so long as they have not secured reparation of violated rights and liberties,

recognition of the principle of nationalities, and of the free existence of small states; so long as they have not brought about a settlement calculated to end, once and for all, forces [*causes*—causes] which have contributed a perpetual menace to the nations [*qui depuis si longtemps ont menacé les nations*—which have so long threatened the nations], and to afford the only effective guarantees for the future security of the world. . .

In conclusion, the Allied Powers think it necessary to put forward the following considerations, which show the special situation of Belgium after two and a half years of war.

In virtue of international treaties, signed by five great European Powers, of whom Germany was one, Belgium enjoyed, before the war, a special status, rendering her territory inviolable and placing her, under the guarantee of the Powers, outside all European conflicts. She was however, in spite of these treaties, the first to suffer the aggression of Germany. For this reason the Belgian Government think it necessary to define the aims which Belgium has never ceased to pursue, while fighting side by side with the Entente Powers for right and justice.

Belgium has always scrupulously fulfilled the duties which her neutrality imposed upon her. She has taken up arms to defend her independence and her neutrality violated by Germany, and to show that she remains faithful [*et pour rester fidèle*—and to be true] to her international obligations. On August 4, 1914, in the Reichstag, the German Chancellor admitted that this aggression constituted an injustice contrary to the laws of nations and pledged himself in the name of Germany to repair it.

During two and a half years this injustice has been cruelly aggravated by the proceedings of the occupying forces, which have exhausted the resources of the country, ruined its industries, devastated its towns and villages, and have been responsible for innumerable massacres, executions and imprisonments. At this very moment, while Germany is proclaiming peace and humanity to the world, she is deporting Belgian citizens by thousands and reducing them to slavery.

Belgium before the war asked for nothing but to live in harmony with all her neighbours. Her King and her Government have but one aim—the re-establishment of peace and justice [*droit*—right]. But they only desire [desire only] a peace which would assure to their country legitimate reparation, guarantees, and safeguards for the future.

Bulgarian Reply to President Wilson's Peace Note, December 30,
1916¹

Consul General Murphy to the Secretary of State

[TELEGRAM]

AMERICAN CONSULATE GENERAL,
Sofia, December 30, 1916.

Referring circular eighteenth.

Bulgarian foreign minister responds following:

"I have had the honor to receive the letter you were pleased to address to me on the 28th of this month to acquaint me with the step taken by Mr. President Wilson in favor of peace, and I hasten to communicate to you the following answer of the Bulgarian Government:

"The generous initiative of the President of the United States tending to create bases for the restoration of peace, was cordially received and taken into consideration by the Royal Government in the same friendly spirit which is evidenced by the presidential communication. The President indicates the object he has at heart and leaves open the choice of the way leading to that object. The Royal Government considers a direct exchange of views to be the most efficacious way to attain the desired end. In accordance with its declaration of the 12th of December inst., which extends a hand for peace negotiations, it has the honor to propose an immediate meeting at one place of delegates of the belligerent powers. The Royal Government shares the view that the great undertaking which consists in preventing future war can only be initiated after the close of present conflict of nations. When that time comes, the Royal Government will be glad to cooperate with the United States of America and other neutral nations in that sublime endeavor.

"Be pleased to accept, Mr. Consul General, the assurances of my high consideration.

"(Signed) DOCTOR RADOSLAVOFF."
MURPHY.

King Constantine's Reply to President Wilson's Peace Note,
December 30, 1916²

I wish to express, Mr. President, feelings of sincere admiration and lively sympathy for the generous initiative you have just taken

¹Official print of the Department of State.

²*The New York Times*, January 1, 1917. For the formal reply of the Greek Government, see *post*, p. 67.

with the view to ascertaining whether the moment is not propitious for a negotiable end of the bloody struggle raging on earth.

Coming from the wise statesman who, in a period so critical for humanity, is placed at the head of the great American Republic, this humanitarian effort, dictated by a spirit of high political sagacity and looking to an honorable peace for all, can not but contribute greatly toward hastening re-establishment of normal life and assuring through a stable state of international relations the evolution of humanity toward that progress wherein the United States of America always so largely shares.

[Here follows a recital of the trials Greece has suffered from the war.]

Such are the conditions in which your proposals find my country. This short and necessarily incomplete recital is not made with the purpose of criticism of the cruel blows at her sovereignty and neutrality from which Greece has been forced to suffer the effects. I have merely wished to show you, Mr. President, how much the soul of Greece at this moment longs for peace, and how much it appreciates your proposals, which constitute so important a step in the course of the bloody world tragedy of which we are witnesses.

CONSTANTINE.

Spanish Reply to President Wilson's Peace Note, December 30, 1916¹

His Majesty's Government has received through your embassy a copy of the note which the President of the United States has presented to the belligerent powers, expressing the desire that an early opportunity should be sought for obtaining from all the nations now at war a declaration as to their intentions so far as regards the bases upon which the conflict might be terminated. This copy is accompanied by another note, signed by yourself, and dated December 22, in which your embassy, in accordance with the instructions of your Government, says, in the name of the President, that the moment seems to be opportune for action on the part of his Majesty's Government, and that it should, if it thinks fit, support the attitude adopted by the Government of the United States.

With regard to the reasonable desire manifested by the latter Government to be supported in its proposition in favor of peace, the Gov-

¹*Current History*, New York, February, 1917, p. 792.

ernment of his Majesty, considering that the initiative has been taken by the President of the North American Republic, and that the diverse impressions which it has caused are already known, is of opinion that the action to which the United States invites Spain would not have efficacy, and the more so because the Central Empires have already expressed their firm intention to discuss the conditions of peace solely with the belligerent powers.

Fully appreciating that the noble desire of the President of the United States will always merit the gratitude of all nations, the Government of his Majesty is decided not to dissociate itself from any negotiation or agreement destined to facilitate the humanitarian work which will put an end to the present war, but it suspends its action, reserving it for the moment when the efforts of all those who desire peace will be more useful and efficacious than is now the case, if there should then be reasons to consider that its initiative or its intervention would be profitable.

Until that moment arrives the Government of his Majesty regards it as opportune to declare that in all that concerns an understanding between the neutral powers for the defense of their material interests affected by the war, it is disposed now, as it has been since the beginning of the present conflict, to enter into negotiations which may tend toward an agreement capable of uniting all the non-belligerent powers which may consider themselves injured or may regard it as necessary to remedy or diminish such injuries.

Declaration of Premier Radoslavoff in the Bulgarian Sobranje, December 30, 1916¹

I can assure you that Bulgaria's work has been brought to a successful conclusion. To those who assert that we are asking too much I reply that we are no Chauvinists, but that we are aware of the aspirations of the Bulgarian people. You know from the Royal Manifesto issued when war was declared what Bulgarian aspirations are. I am not obliged to reply to each speaker individually.

[Dr. Radoslavoff declared that the peace proposals had been received with enthusiasm in neutral countries. Besides Switzerland and the Scandinavian countries, he understood that Holland and Spain were preparing to support the *démarche* of President Wilson. Bulgaria's

¹*The Times*, London, January 2, 1917.

alliance with the Central Empires and Turkey had not weakened. They were ready to conclude peace because they wished to see an end of war. They would make concessions in the name of humanity and for the welfare of all nations.]

Austro-Hungarian Reply to the Scandinavian Peace Note, January 1, 1917¹

The Austro-Hungarian Government is glad to state that its views in this matter agree with yours. It has sympathetically accepted President Wilson's suggestions, and therefore with satisfaction sees Sweden, Denmark, and Norway support President Wilson's initiative.

Statement of Emile Vandervelde, Belgian Minister of State, on the Peace Proposals²

From clandestine inquiries which I have been able to make among the popular leaders in the occupied part of Belgium since the publication of the German peace proposals I believe that the Belgian people are in complete accord with their Government in the attitude it has assumed towards the Chancellor's note. There must be no annexation if the peace following this war is to prevent other wars. That is one of the reasons why it would be futile even to comment upon the suggestion from German sources that the Germans are willing to abandon Belgium in exchange for the Belgian Congo.

There is no complaint of your President's action among the Belgian people. We believe that Mr. Wilson acted wholly in the spirit of humanitarianism, and that the steps he has taken will help rather than harm our cause. A comparison of the Allies' expression of views and our enemies' will suffice, I think, to convince the United States of the insincerity of Germany's attitude and the impossibility of discussing her present proposals.

It is very possible, however, that as her need for peace, which I believe to be very great, grows more pronounced, Germany will come

¹*The New York Times*, January 2, 1917. See footnote, *ante*, p. 33.

²*The Times*, London, January 9, 1917.

forward with more reasonable proposals. It would then become necessary for us to scrutinize such future offers as closely as we have those already formulated and declined.

The incredible, brutal slave traffic in which the Germans are now engaged in Belgium, against which your Government has raised its voice, has only served to increase my compatriots' horror of a peace imposed by Berlin.

Chinese Reply to President Wilson's Peace Note, January 9, 1917¹

Minister Reinsch to the Secretary of State

[TELEGRAM]

AMERICAN LEGATION,
Peking, January 9, 1917.

Minister for Foreign Affairs has written as follows in answer to my note transmitting the President's note to the belligerent powers:

"I have examined, with the care which the gravity of the questions raised demands, the note concerning peace which President Wilson has addressed to the Governments of the Allies and the Central Powers now at war and the text of which Your Excellency has been good enough to transmit to me under instructions of your Government.

"China, a nation traditionally pacific, has recently again manifested her sentiments in concluding treaties concerning the pacific settlement of international disputes, responding thus to the (. . .)² of the peace conferences held at The Hague.

"On the other hand the present war, by its prolongation, has seriously affected the interests of China more so perhaps than those of other powers which have remained neutral. She is at present at a time of reorganization which demands economically and industrially the cooperation of foreign countries, cooperation which a large number of them are unable to accord on account of the war in which they are engaged.

"In manifesting her sympathy for the spirit of the President's note, having in view the ending as soon as possible of the hostilities, China

¹Official print of the Department of State.

²Apparent omission.

is but acting in conformity with not only her interest but also with her profound sentiments.

"On account of the extent which modern wars are apt to assume and the repercussion which they bring about, their effects are no longer limited to belligerent states. All countries are interested in seeing wars becoming as rare as possible. Consequently China can not but show satisfaction with the views of the Government and people of the United States of America who declare themselves ready and even eager to cooperate when the war is over by all proper means to assure the respect of the principle of the equality of nations whatever their power may be and to relieve them of the peril of wrong and violence. China is ready to join her efforts with theirs for the attainment of such results which can only be obtained through the help of all."

REINSCH.

Entente Reply to President Wilson's Peace Note, January 10, 1917¹

Ambassador Sharp to the Secretary of State

[TELEGRAM]

AMERICAN EMBASSY,
Paris, January 10, 1917.

The following is the translation of the French note:

"The Allied Governments have received the note which was delivered to them in the name of the Government of the United States on the nineteenth of December, 1916. They have studied it with the care imposed upon them both by the exact realization which they have of the gravity of the hour and by the sincere friendship which attaches them to the American people.

"In general way they wish to declare that they pay tribute to the elevation of the sentiment with which the American note is inspired and that they associate themselves with all their hopes with the project for the creation of a league of nations to insure peace and justice throughout the world. They recognize all the advantages for the cause of humanity and civilization which the institution of international agreements, destined to avoid violent conflicts between nations would prevent; agreements which must imply the sanctions necessary to insure their execution and thus to prevent an apparent security from only facilitating new aggressions. But a discussion of future arrange-

¹Official print of the Department of State.

ments destined to insure an enduring peace presupposes a satisfactory settlement of the actual conflict; the Allies have as profound a desire as the Government of the United States to terminate as soon as possible a war for which the Central Empires are responsible and which inflicts such cruel sufferings upon humanity. But they believe that it is impossible at the present moment to attain a peace which will assure them reparation, restitution and such guarantees to which they are entitled by the aggression for which the responsibility rests with the Central Powers and of which the principle itself tended to ruin the security of Europe; a peace which would on the other hand permit the establishment of the future of European nations on a solid basis. The Allied nations are conscious that they are not fighting for selfish interests, but above all to safeguard the independence of peoples, of right and of humanity.

"The Allies are fully aware of the losses and suffering which the war causes to neutrals as well as to belligerents and they deplore them; but they do not hold themselves responsible for them, having in no way either willed or provoked this war, and they strive to reduce these damages in the measure compatible with the inexorable exigencies of their defense against the violence and the wiles of the enemy.

"It is with satisfaction therefore that they take note of the declaration that the American communication is in nowise associated in its origin with that of the Central Powers transmitted on the eighteenth of December by the Government of the United States. They did not doubt moreover the resolution of that Government to avoid even the appearance of a support, even moral, of the authors responsible for the war.

"The Allied Governments believe that they must protest in the most friendly but in the most specific manner against the assimilation established in the American note between the two groups of belligerents; this assimilation, based upon public declarations by the Central Powers, is in direct opposition to the evidence, both as regards responsibility for the past and as concerns guarantees for the future; President Wilson in mentioning it certainly had no intention of associating himself with it.

"If there is an historical fact established at the present date, it is the willful aggression of Germany and Austria-Hungary to insure their hegemony over Europe and their economic domination over the world. Germany proved by her declaration of war, by the immediate violation of Belgium and Luxemburg and by her manner of conducting the war, her simulating contempt for all principles of humanity and all

respect for small States; as the conflict developed the attitude of the Central Powers and their Allies has been a continual defiance of humanity and civilization. Is it necessary to recall the horrors which accompanied the invasion of Belgium and Servia, the atrocious *régime* imposed upon the invaded countries, the massacre of hundreds of thousands of inoffensive Armenians, the barbarities perpetrated against the populations of Syria, the raids of Zeppelins on open towns, the destruction by submarines of passenger steamers and of merchantmen even under neutral flags, the cruel treatment inflicted upon prisoners of war, the juridical murders of Miss Cavel, of Captain Fryatt, the deportation and the reduction to slavery of civil populations, *et cetera*? The execution of such a series of crimes perpetrated without any regard for universal reprobation fully explains to President Wilson the protest of the Allies.

"They consider that the note which they sent to the United States in reply to the German note will be a response to the questions put by the American Government, and according to the exact words of the latter, constitute 'a public declaration as to the conditions upon which the war could be terminated.'

"President Wilson desires more: he desires that the belligerent powers openly affirm the objects which they seek by continuing the war; the Allies experience no difficulty in replying to this request. Their objects in the war are well known; they have been formulated on many occasions by the chiefs of their divers Governments. Their objects in the war will not be made known in detail with all the equitable compensations and indemnities for damages suffered until the hour of negotiations. But the civilized world knows that they imply in all necessity and in the first instance the restoration of Belgium, of Servia, and of Montenegro and the indemnities which are due them; the evacuation of the invaded territories of France, of Russia and of Roumania with just reparation; the reorganization of Europe guaranteed by a stable *régime* and founded as much upon respect of nationalities and full security and liberty economic development, which all nations, great or small, possess, as upon territorial conventions and international agreements suitable to guarantee territorial and maritime frontiers against unjustified attacks; the restitution of provinces or territories wrested in the past from the Allies by force or against the will of their populations, the liberation of Italians, of Slavs, of Roumanians and of Tcheco Slovaques from foreign domination; the enfranchisement of populations subject to the bloody tyranny of the Turks; the expulsion from Europe of the Ottoman

Empire decidedly (. . .)¹ to western civilization. The intentions of His Majesty the Emperor of Russia regarding Poland have been clearly indicated in the proclamation which he has just addressed to his armies. It goes without saying that if the Allies wish to liberate Europe from the brutal covetousness of Prussian militarism, it never has been their design, as has been alleged, to encompass the extermination of the German peoples and their political disappearance. That which they desire above all is to insure a peace upon the principles of liberty and justice, upon the inviolable fidelity to international obligation with which the Government of the United States has never ceased to be inspired.

"United in the pursuits of this supreme object the Allies are determined, individually and collectively, to act with all their power and to consent to all sacrifices to bring to a victorious close a conflict upon which they are convinced not only their own safety and prosperity depends but also the future of civilization itself."

SHARP.

Belgian Note supplementary to the Entente Reply to President Wilson's Peace Note, January 10, 1917²

Ambassador Sharp to the Secretary of State

[TELEGRAM]

AMERICAN EMBASSY,
Paris, January 10, 1917.

Copy of Belgian note as follows:

"The Government of the King, which has associated itself with the answer handed by the President of the French Council to the American Ambassador on behalf of all, is particularly desirous of paying tribute to the sentiment of humanity which prompted the President of the United States to send his note to the belligerent powers and it highly esteems the friendship expressed for Belgium through his kindly intermediation. It desires as much as Mr. Woodrow Wilson to see the present war ended as early as possible.

"But the President seems to believe that the statesmen of the two opposing camps pursue the same objects of war. The example of Belgium unfortunately demonstrates that this is in no wise the fact.

¹Apparent omission.

²Official print of the Department of State.

Belgium has never, like the Central Powers, aimed at conquests. The barbarous fashion in which the German Government has treated, and is still treating, the Belgium nation, does not permit the supposition that Germany will preoccupy herself with guaranteeing in the future the rights of the weak nations which she has not ceased to trample under foot since the war, let loose by her, began to desolate Europe. On the other hand, the Government of the King has noted with pleasure and with confidence the assurances that the United States is impatient to cooperate in the measures which will be taken after the conclusion of peace, to protect and guarantee the small nations against violence and oppression.

"Previous to the German ultimatum, Belgium only aspired to live upon good terms with all her neighbors; she practiced with scrupulous loyalty towards each one of them the duties imposed by her neutrality. In the same manner she has been rewarded by Germany, for the confidence she placed in her, through which, from one day to the other, without any plausible reason, her neutrality was violated, and the Chancellor of the Empire when announcing to the Reichstag this violation of right and of treaties, was obliged to recognize the iniquity of such an act and predetermine that it would be repaired. But the Germans, after the occupation of Belgian territory, have displayed no better observance of the rules of international law or the stipulations of the Hague Convention. They have, by taxation, as heavy as it is arbitrary, drained the resources of the country; they have intentionally ruined its industries, destroyed whole cities, put to death and imprisoned a considerable number of inhabitants. Even now, while they are loudly proclaiming their desire to put an end to the horrors of war, they increase the rigors of the occupation by deporting into servitude Belgian workers by the thousands.

"If there is a country which has the right to say that it has taken up arms to defend its existence, it is assuredly Belgium. Compelled to fight or to submit to shame, she passionately desires that an end be brought to the unprecedented sufferings of her population. But she could only accept a peace which would assure her, as well as equitable reparation, security and guarantees for the future.

"The American people, since the beginning of the war, has manifested for the oppressed Belgian nation, its most ardent sympathy. It is an American committee, the Commission for Relief in Belgium which, in close union with the Government of the King and the National Committee, displays an untiring devotion and marvelous activity in re-victualling Belgium. The Government of the King is happy

to avail itself of this opportunity to express its profound gratitude to the Commission for Relief as well as to the generous Americans eager to relieve the misery of the Belgian population. Finally, nowhere more than in the United States have the abductions and deportations of Belgian civilians provoked such a spontaneous movement of protestation and indignant reproof.

"These facts, entirely to the honor of the American nation, allow the Government of the King to entertain the legitimate hope that at the time of the definitive settlement of this long war, the voice of the Entente Powers will find in the United States a unanimous echo to claim in favor of the Belgian nation, innocent victim of German ambition and covetousness, the rank and the place which its irreproachable past, the valor of its soldiers, its fidelity to honor and its remarkable faculties for work assign to it among the civilized nations."

SHARP.

German Note to Neutral Powers relative to the Entente Reply to the Peace Proposals, January 11, 1917¹

The Imperial Government is aware that the Government of the United States of America, the Royal Spanish Government, and the Swiss Government have received the reply of their enemies to the note of December 12, in which Germany, in concert with her allies, proposed to enter forthwith into peace negotiations. Our enemies rejected this proposal, arguing that it was a proposal without sincerity and without meaning. The form in which they couched their communication makes a reply to them impossible. But the German Government thinks it important to communicate to the neutral Powers its view of the state of affairs.

The Central Powers have no reason to enter again into a controversy regarding the origin of the world war. History will judge on whom the blame of the war falls. Its judgment will as little pass over the encircling policy of England, the *revanche* policy of France, and Russia's aspiration after Constantinople as over the provocation by Serbia, the Serajevo murders, and the complete Russian mobilization, which meant war on Germany.

Germany and her allies, who were obliged to take up arms to defend their freedom and their existence, regard this, which was

¹*The Times*, London, January 13, 1917.

their war aim, as attained. On the other hand, the enemy Powers have departed more and more from the realization of their plans, which, according to the statements of their responsible statesmen, are directed, among other things, toward the conquest of Alsace-Lorraine and several Prussian provinces, the humiliation and diminution of Austria-Hungary, the disintegration of Turkey, and the dismemberment of Bulgaria. In view of such war aims, the demand for reparation, restitution, and guarantees in the mouth of our enemies sounds strange.

Our enemies describe the peace offer of the four allied powers as a war manœuvre. Germany and her allies most emphatically protest against such a falsification of their motives, which they openly stated. Their conviction was that a just peace acceptable to all belligerents was possible, that it could be brought about, and that further bloodshed could not be justified. Their readiness to make known their peace conditions without reservation at the opening of negotiations disproves any doubt of their sincerity.

Our enemies, in whose power it was to examine the real value of our offer neither made any examination nor made counter-proposals. Instead of that, they declared that peace was impossible so long as the restoration of violated rights and liberties, the acknowledgment of the principle of nationalities, and the free existence of small States were not guaranteed. The sincerity which our enemies deny to the proposal of the four allied Powers can not be allowed by the world to these demands if it recalls the fate of the Irish people, the destruction of the freedom and independence of the Boer Republics, the subjection of Northern Africa by England, France and Italy, the suppression of foreign nationalities in Russia, and, finally, the oppression of Greece, which is unexampled in history.

Moreover, in regard to the alleged violation of international rights by the four allied Powers, those Powers which, from the beginning of the war, have trampled upon right and torn up the treaties on which it was based have no right to protest. Already in the first weeks of the war England had renounced the Declaration of London, the contents of which her own delegates had recognized as binding in international law, and in the further course of the war she most seriously violated the Declaration of Paris, so that, owing to arbitrary measures, a state of lawlessness began in the war at sea. The starvation campaign against Germany and the pressure on neutrals exercised in England's interest are no less grossly contrary to the rules of international law than to the laws of humanity.

Equally inconsistent with international law and the principles of civilization is the employment of coloured troops in Europe and the extension of the war to Africa, which has been brought about in violation of existing treaties. It undermines the reputation of the white race in this part of the globe. The inhumane treatment of the prisoners, especially in Africa and Russia, the deportation of the civil population from East Prussia, Alsace-Lorraine, Galicia, and the Bukovina are further proofs of our enemies' disregard for right and civilization.

At the end of their note of December 30, our enemies refer to the special position of Belgium. The Imperial Government is unable to admit that the Belgian Government has always observed its obligations. Already before the war Belgium was under the influence of England and leaned towards England and France, thereby herself violating the spirit of the treaties which guaranteed her independence and neutrality.

Twice the Imperial Government declared to the Belgian Government that it was not entering Belgium as an enemy, and entreated it to save the country from the horrors of war. In this case it offered Belgium a guarantee for the full integrity and independence of the kingdom and to pay for all the damage which might be caused by German troops marching through the country. It is known that in 1887 the Royal British Government was determined not to oppose on these conditions the claiming of a right of way through Belgium. The Belgian Government refused the repeated offer of the Imperial Government. On it and on those Powers who induced it to take up this attitude falls the responsibility for the fate which befell Belgium.

The accusation about German war methods in Belgium and the measures which were taken there in the interest of military safety have been repeatedly repudiated as untrue by the Imperial Government. It again emphatically protests against these calumnies.

Germany and her allies made an honest attempt to terminate the war and pave the way for an understanding among the belligerents. The Imperial Government declares that it solely depended on the decision of our enemies whether the road to peace should be taken or not. The enemy Governments have refused to take this road. On them falls the full responsibility for the continuation of bloodshed.

But the four allied Powers will prosecute the fight with calm trust and confidence in their good cause until a peace has been gained which guarantees to their own peoples honour, existence, freedom,

and development, and gives all the Powers of the European Continent the benefit of working united in mutual esteem at the solution of the great problems of civilization.

Extracts from the Austro-Hungarian Note to Neutral Powers relative to the Entente Reply to the Peace Proposals, January 11, 1917¹

In the years preceding the Austro-Hungarian ultimatum to Serbia the Monarchy displayed sufficient proof of its forbearance toward the ever-increasing hostility, aggressive intentions, and intrigues of Serbia until the moment when finally the notorious murders at Serajevo made further indulgence impossible.

The question as to on which side the military situation is the stronger appears idle, and may confidently be left to the judgment of the world. The four allied powers now look on their purely defensive war aims as attained, while their enemies travel further and further from the realization of their plans.

For the enemy to characterize our peace proposals as meaningless before peace negotiations were begun, and so long as, therefore, our peace conditions are unknown, is merely to make an arbitrary assertion. We had made full preparations for the acceptance of our offer to make known our peace conditions on entering into the negotiations. We declared ourselves ready to end the war by a verbal exchange of views with the enemy Governments, and it depended solely on our enemies' decision whether peace were brought about or not.

Before God and mankind we repudiate responsibility for continuance of the war.

Premier Lloyd George's Guildhall Address, January 11, 1917²

The Chancellor of the Exchequer, in his extremely lucid and impressive speech, has placed before you the business side of his proposal, and I think you will agree with me, after his explanation of his scheme, that he has offered for subscription a Loan which contains all the essential ingredients of an attractive investment. They are the most

¹*The New York Times*, January 13, 1917.

²*The Times*, London, January 12, 1917.

generous terms the Government could offer without injury to the taxpayer. I agree that the Chancellor of the Exchequer, was right in offering such liberal terms, because it is important that we should secure a big loan now—not merely in order to enable us to finance the war effectively, but as a demonstration of the continued resolve of this country to prosecute it. And it is upon that aspect of the question that I should like to say a few words.

The German Kaiser a few days ago sent a message to his people that the Allies had rejected his peace offer. He did so in order to drug those whom he can no longer dragoon. Where are those offers? We have asked for them. We have never seen them. We were not offered terms; we were offered a trap baited with fair words. They tempted us once, but the Lion has his eyes open now. We have rejected no terms that we have ever seen. Of course, it would suit them to have peace at the present moment on their own terms. We all want peace; but when we get it, it must be a real peace. The Allied Powers separately, and in council together, have come to the same conclusion. Knowing well what war means, knowing especially what this war means in suffering, in burdens, in horror, they have decided that even war is better than peace—peace at the Prussian price of domination over Europe. We made that clear in our reply to Germany; we made it still clearer in our reply to the United States of America. Before we attempt to rebuild the temple of peace we must see now that the foundations are solid. They were built before upon the shifting sands of Prussian faith; henceforth, when the time for rebuilding comes, it must be on the rock of vindicated justice.

I have just returned from a council of war of the four great Allied countries upon whose shoulders most of the burden of this terrible war falls. I can not give you the conclusions: there might be useful information in them for the enemy. There were no delusions as to the magnitude of our task; neither were there any doubts about the result. I think I could say what was the feeling of every man there. It was one of the most business-like conferences that I ever attended. We faced the whole situation, probed it thoroughly, looked the difficulties in the face, and made arrangements to deal with them—and we separated more confident than ever. All felt that if victory were difficult, defeat was impossible. There was no flinching, no wavering, no faint-heartedness, no infirmity of purpose. There was a grim resolution at all costs that we must achieve the high aim with which we accepted the challenge of the Prussian military caste

and rid Europe and the world for ever of its menace. No country could have refused that challenge without loss of honour. No one could have rejected it without impairing national security. No one could have failed to take it up without forfeiting something which is of greater value to every free and self-respecting people than life itself.

These nations did not enter into the war light-heartedly. They did not embark upon this enterprise without knowing what it really meant. They were not induced by the prospect of an easy victory. Take this country. The millions of our men who enrolled in the Army enlisted after the German victories of August, 1914—when they knew the accumulative and concentrated power of the German military machine. That is when they placed their lives at the disposal of their country. What about other nations? They knew what they were encountering, that they were fighting an organization, which had been perfected for generations by the best brains of Prussia, perfected with one purpose—the subjugation of Europe. And yet they faced it. Why did they do it? I passed through hundreds of miles of the beautiful lands of France and of Italy, and as I did so I asked myself this question, Why did the peasants leave by the million these sunny vineyards and cornfields in France—why did they quit these enchanting valleys, with their comfort, and their security, their calm in Italy—in order to face the dreary and wild horrors of the battlefield? They did it for one purpose and one purpose only. They were not driven to the slaughter by kings. These are great democratic countries. No Government could have lasted twenty-four hours that had forced them into an abhorrent war. Of their own free will they embarked upon it, because they knew a fundamental issue had been raised which no country could have shirked without imperilling all that has been won in the centuries of the past and all that remains to be won in the ages of the future.

That is why, as the war proceeds, and the German purpose becomes more manifest, the conviction has become deeper in the minds of these people that they must break their way through to victory in order to save Europe from unspeakable despotism. That was the spirit which animated the Allied Conference at Rome last week.

But I will tell you one thing that struck me, and strikes me more and more each time that I visit the Continent and attend these conferences. That is the increasing extent to which the Allied peoples are looking to Great Britain. They are trusting to her rugged strength, to her great resources, more and more. To them she

looks like a great tower in the deep. She is becoming more and more the hope of the oppressed and the despair of the oppressor, and I feel more and more confident that we shall not fail the people who put their trust in us. When that arrogant Prussian caste flung the signature of Britain to a treaty into the waste-paper basket as if it were of no account, they knew not the pride of the land they were treating with such insolent disdain. They know it now. Our soldiers and sailors have taught them to respect it.

You have heard the eloquent account of the Chancellor of the Exchequer of the achievements of our soldiers. Our sailors are gallantly defending the honour of our country on the high seas of the world. They have strangled the enemy's commerce, and will continue to do so, in spite of all the piratical devices of the foe. In 1914 and 1915, for two years, a small, ill-equipped Army held up the veterans of Prussia with the best equipment in Europe. In 1916 they hurled them back, and delivered a blow from which they are reeling. In 1917 the Armies of Britain will be more formidable than ever in training, in efficiency, and in equipment, and you may depend upon it that if we give them the necessary support they will cleave a road to victory through all the dangers and perils of the next few months.

But we must support them. They are worth it. Have you ever talked to a soldier who has come back from the front? There is not one of them who will not tell you how he is encouraged and sustained by hearing the roar of the guns behind him. This is what I want to see: I want to see cheques hurtling through the air, fired from the city of London, from every city, town, village, and hamlet throughout the land, fired straight into the intrenchments of the enemy. Every well-directed cheque, well loaded, properly primed, is a more formidable weapon of destruction than a 12-in. shell. It clears the path of the barbed wire entanglements for our gallant fellows to march through. A big loan helps to ensure victory. A big loan will also shorten the war. It will help to save life; it will help to save the British Empire; it will help to save Europe; it will help to save civilization. That is why we want the country to rise to this occasion, and show that the old spirit of Britain, represented by this great British meeting, is still as alive and as alert and as potent as ever.

I want to appeal to the men at home, and to the women also. They have done their part nobly. A man who has been Munitions Minister for twelve months must feel a debt of gratitude to the women

for what they have done. They have helped to win, and without them we could not have done it. I want to make a special appeal, or, rather, to enforce the special appeal of the Chancellor of the Exchequer. Let no money be squandered in luxury and indulgence which can be put into the fight—and it can, every penny of it. Every ounce counts in this fight. Do not waste it. Do not throw it away. Put it there to help the valour of our brave young boys. Back them up. Let us contribute to assist them. Have greater pride in them than in costlier garments. They will feel prouder of their mothers to-day, and their pride in them will grow in years to come when the best garments will have rotted. It will glisten and glitter. It will improve with the years. They can put it on with old age and say, "This is something I contributed in the Great War," and they will be proud of it.

Men and women of England, Scotland, Wales and Ireland, the first charge—the first charge—upon all your surplus money over your needs for yourselves and your children should be to help those gallant young men of ours who have tendered their lives for the cause of humanity. The more we get the surer the victory. The more we get the shorter the war. The more we get the less it will cost in treasure, and the greatest treasure of all, brave blood. The more we give the more will the nation gain. You will enrich it by your contributions—by your sacrifices. Extravagance—I want to bring this home to every man and woman throughout these Islands—extravagance during the war costs blood—costs blood. And what blood? Valiant blood—the blood of heroes. It would be worth millions to save one of them. A big loan will save myriads of them; help them not merely to win; help them to come home to shout for the victory which they have won. It means better equipment for our troops. It means better equipment for the Allies as well, and this—and I say it now for the fiftieth, if not for the hundredth time—is a war of equipment. That is why we are appealing for your subscriptions. We can do that. Most of us could not do more. But what we can do it is our duty, it is our pride to do.

I said it was a war of equipment. Why are the Germans pressing back our gallant Allies in Roumania? It is not that they are better fighters. They are certainly not. The Roumanian peasant has proved himself to be one of the doughtiest fighters in the field when he has a chance, poor fellow, and he never had much. As for the Russian, the way in which with bare breast he has fought for two years and a half, with inferior guns, insufficient rifles, inadequate sup-

plies of ammunition, is one of the world's tales of heroism. Let us help to equip them, and there will be another story to tell soon.

That is why I am glad to follow the Chancellor of the Exchequer in the appeal which he has made to the patriotism of our race. But with true Scottish instincts he put the appeal to produce first. He laid it down as a good foundation for patriotism and reserved that for his peroration. I shall reverse the order, belonging to a less canny race. I want to say it is a good investment. After all, the old country is the best investment in the world. It was a sound concern before the war; it will be sounder and safer than ever after the war, and especially safer. I do not know the nation that will care to touch it after the war. They had forgotten what we were like in those days; it will take them a long time to forget this lesson. It will be a safer investment than ever and a sounder one.

Have you been watching what has been going on? Before the war we had a good many shortcomings in our business, our commerce and our industry. The war is setting them all right in the most marvelous way. You ask great business men like my friend Lord Pirrie, whom I see there in the corner, what is going on in the factories throughout Great Britain and Ireland. Old machinery scrapped, the newest and the best set up; slipshod, wasteful methods also scrapped, hampering customs discontinued; millions brought into the labour market to help to produce who before were merely consumers. I do not know what the National Debt will be at the end of this war but I will make this prediction. Whatever it is, what is added in real assets to the real riches of the nation will be infinitely greater than any debt that we shall ever acquire. The resources of the nation in every direction developed, directed, perfected, the nation itself disciplined, braced up, quickened, we have become a more alert people. We have thrown off useless tissues. We are a nation that has been taking exercise. We are a different people.

I will tell you another difference. The Prussian menace was a running mortgage which detracted from the value of our national security. Nobody knew what it meant. We know pretty well now. You could not tell whether it meant a mortgage of hundreds of millions, or thousands of millions, and I know you could not tell it would not mean ruin. That mortgage will be cleared off forever and there will be a better security, a better, sounder, safer security, at a better rate of interest. The world will then be able, when the war is over, to attend to its business. There will be no war or rumours of war to disturb and to distract it. We can build up;

we can reconstruct; we can till and cultivate and enrich; and the burden and terror and waste of war will have gone. The best security for peace will be that nations will band themselves together to punish the first peace-breaker. In the armouries of Europe every weapon will be a sword of justice. In the government of men every army will be the constabulary of peace.

There were men who hoped to see this achieved in the ways of peace. We were disappointed. It was ordained that we should not reach that golden era except along a path which itself was paved with gold, yea, and cemented with valiant blood. There are myriads who have given the latter, and there are myriads more ready for the sacrifice if their country needs it. It is for us to contribute the former. Let no man and no woman, in this crisis of their nation's fate, through indolence, greed, avarice, or selfishness, fail. And if they do their part, then, when the time comes for the triumphal march through the darkness and the terror of night into the bright dawn of the morning of the new age, they will each feel that they have their share in it.

British Note of January 13, 1917, amplifying the Entente Reply to President Wilson's Peace Note¹

In sending you a translation of the Allied note I desire to make the following observations, which you should bring to the notice of the United States Government.

I gather from the general tenour of the President's note that, while he is animated by an intense desire that peace should come soon and that when it comes it should be lasting, he does not, for the moment at least, concern himself with the terms on which it should be arranged. His Majesty's Government entirely share the President's ideals; but they feel strongly that the durability of the peace must largely depend on its character and that no stable system of international relations can be built on foundations which are essentially and hopelessly defective.

This becomes clearly apparent if we consider the main conditions which rendered possible the calamities from which the world is now suffering. These were the existence of a Great Power consumed with the lust of domination in the midst of a community of nations ill-

¹*The Times*, London, January 18, 1917.

prepared for defence, plentifully supplied, indeed, with international laws, but with no machinery for enforcing them, and weakened by the fact that neither the boundaries of the various States nor their internal constitution harmonized with the aspirations of their constituent races or secured to them just and equal treatment.

That this last evil would be greatly mitigated if the Allies secured the changes in the map of Europe outlined in their joint note is manifest, and I need not labour the point.

It has been argued, indeed, that the expulsion of the Turks from Europe forms no proper or logical part of this general scheme. The maintenance of the Turkish Empire was, during many generations, regarded by statesmen of world-wide authority as essential to the maintenance of European peace. Why, it is asked, should the cause of peace be now associated with a complete reversal of this traditional policy?

The answer is that circumstances have completely changed. It is unnecessary to consider now whether the creation of a reformed Turkey, mediating between hostile races in the Near East, was a scheme which, had the Sultan been sincere and the Powers united, could ever have been realized. It certainly can not be realized now. The Turkey of "Union and Progress" is at least as barbarous and is far more aggressive than the Turkey of Sultan Abdul Hamid. In the hands of Germany it has ceased even in appearance to be a bulwark of peace, and is openly used as an instrument of conquest. Under German officers Turkish soldiers are now fighting in lands from which they had long been expelled, and a Turkish Government controlled, subsidized, and supported by Germany has been guilty of massacres in Armenia and Syria more horrible than any recorded in the history even of those unhappy countries. Evidently the interests of peace and the claims of nationality alike require that Turkish rule over alien races shall, if possible, be brought to an end; and we may hope that the expulsion of Turkey from Europe will contribute as much to the cause of peace as the restoration of Alsace-Lorraine to France, of Italia Irredenta to Italy, or any of the other territorial changes indicated in the Allied note.

Evidently, however, such territorial rearrangements, though they may diminish the occasions of war, provide no sufficient security against its recurrence. If Germany, or rather, those in Germany who mold its opinions and control its destinies, again set out to dominate the world, they may find that by the new order of things the adventure is made more difficult, but hardly that it is made impossible. They

may still have ready to their hand a political system organized through and through on a military basis; they may still accumulate vast stores of military equipment; they may still perfect their methods of attack, so that their more pacific neighbours will be struck down before they can prepare themselves for defence. If so, Europe, when the war is over, will be far poorer in men, in money, and in mutual goodwill than it was when the war began, but it will not be safer; and the hopes for the future of the world entertained by the President will be as far as ever from fulfilment.

There are those who think that for this disease international treaties and international laws may provide a sufficient cure. But such persons have ill learned the lessons so clearly taught by recent history. While other nations, notably the United States of America and Britain, were striving by treaties of arbitration to make sure that no chance quarrel should mar the peace they desired to make perpetual, Germany stood aloof. Her historians and philosophers preached the splendors of war; Power was proclaimed as the true end of the State; the General Staff forged with untiring industry the weapons by which at the appointed moment Power might be achieved. These facts proved clearly enough that treaty arrangements for maintaining peace were not likely to find much favour at Berlin; they did not prove that such treaties, once made, would be utterly ineffectual. This became evident only when war had broken out; though the demonstration, when it came, was overwhelming. So long as Germany remains the Germany which, without a shadow of justification, over-ran and barbarously ill-treated a country it was pledged to defend, no State can regard its rights as secure if they have no better protection than a solemn treaty.

The case is made worse by the reflection that these methods of calculated brutality were designed by the Central Powers, not merely to crush to the dust those with whom they were at war, but to intimidate those with whom they were still at peace. Belgium was not only a victim—it was an example. Neutrals were intended to note the outrages which accompanied its conquest, the reign of terror which followed on its occupation, the deportation of a portion of its population, the cruel oppression of the remainder. And, lest the nations happily protected, either by British fleets or by their own, from German armies should suppose themselves safe from German methods, the submarine has (within its limits) assiduously imitated the barbarous practices of the sister service. The War Staffs of the Central Powers are well content to horrify the world if at the same time they can terrorize it.

If, then, the Central Powers succeed, it will be to methods like these that they will owe their success. How can any reform of international relations be based on a peace thus obtained? Such a peace would represent the triumph of all the forces which make war certain and make it brutal. It would advertise the futility of all the methods on which civilization relies to eliminate the occasions of international dispute and to mitigate their ferocity.

Germany and Austria made the present war inevitable by attacking the rights of one small State, and they gained their initial triumphs by violating the treaty-guarded territories of another. Are small States going to find in them their protectors or in treaties made by them a bulwark against aggression? Terrorism by land and sea will have proved itself the instrument of victory. Are the victors likely to abandon it on the appeal of neutrals? If existing treaties are no more than scraps of paper, can fresh treaties help us? If the violations of the most fundamental canons of international law be crowned with success, will it not be in vain that the assembled nations labour to improve their code? None will profit by their rules but the criminals who break them. It is those who keep them that will suffer.

Though, therefore, the people of this country share to the full the desire of the President for peace, they do not believe that peace can be durable if it be not based on the success of the Allied cause. For a durable peace can hardly be expected unless three conditions are fulfilled. The first is that the existing causes of international unrest should be as far as possible removed or weakened. The second is that the aggressive aims and the unscrupulous methods of the Central Powers should fall into disrepute among their own peoples. The third is that behind international law and behind all treaty arrangements for preventing or limiting hostilities some form of international sanction should be devised which would give pause to the hardest aggressor. These conditions may be difficult of fulfilment. But we believe them to be in general harmony with the President's ideals, and we are confident that none of them can be satisfied, even imperfectly, unless peace be secured on the general lines indicated (so far as Europe is concerned) in the joint note. Therefore it is that this country has made, is making, and is prepared to make sacrifices of blood and treasure unparalleled in its history. It bears these heavy burdens, not merely that it may thus fulfil its treaty obligations, nor yet that it may secure a barren triumph of one group of nations over another. It bears them because it firmly believes that on the success of the Allies depend

the prospects of peaceful civilization and of those international reforms which the best thinkers of the New World, as of the Old, dare to hope may follow on the cessation of our present calamities.

I am, with great truth and respect, Sir, your Excellency's most obedient, humble servant,

ARTHUR JAMES BALFOUR.

Kaiser Wilhelm's Proclamation to the German People, January 13, 1917¹

Our enemies have dropped the mask. After refusing with scorn and hypocritical words of love for peace and humanity our honest peace offer, they now, in their reply to the United States, have gone beyond that and admitted their lust for conquest, the baseness of which is further enhanced by their calumnious assertions. Their aim is the crushing of Germany, the dismemberment of the Powers allied with us, and the enslavement of the freedom of Europe and the seas, under the same yoke that Greece, with gnashing of teeth, is now enduring. But what they, in thirty months of the bloodiest fighting and unscrupulous economic war could not achieve, they will also in all the future not accomplish.

Our glorious victories and our iron strength of will, with which our fighting people at the front and at home have borne all hardships and distress, guarantee that also in the future our beloved Fatherland has nothing to fear. Burning indignation and holy wrath will redouble the strength of every German man and woman, whether it is devoted to fighting, work, or suffering. We are ready for all sacrifices. The God who planted His glorious spirit of freedom in our brave people's heart will also give us and our loyal Allies, tested in battle, full victory over all the enemy lust for power and rage for destruction.

WILHELM, I. R.

Statement of Francesco Ruffini, Italian Minister of Public Instruction, Rome, January 14, 1917²

In the note of the Allies to President Wilson, they make a point which is understandable to neutrals, and particularly to America. Italy,

¹*The Times*, London, January 15, 1917.

²*The New York Times*, January 16, 1917.

no less than her allies, awaits with calm confidence the realization of the aims set forth in that passage of the note which refers to the redemption of Italians subject to Austria. The German press seeks to depict Italy as desirous of conquests, but American public opinion, so far-seeing, so well educated to freedom and to a deep spirit of national unity, can not confound brutal lust of conquest with a justified claim to territories with populations like those of the Trentino, Istria and Dalmatia.

These territories have had only one civilization in their history, that of Italy, and only one great humiliation—which must cease—that of foreign domination which attempted to destroy the principle of nationality. America knows well that Italy, notwithstanding these just claims, abstained from any provocation before the European conflagration, being occupied only with her peaceful development. Austria was responsible for the outbreak of the conflict, having willed war with Serbia after provoking Italy one hundred times with violent persecution of Italians of Trent, Trieste, Fiume and Zara, whom she denied even the right to educate themselves in their own language.

Once the conflagration was ignited, Italy felt that fate called her to complete her national unity and resume her just and holy work and her wars of independence, which have been studied with such enthusiasm by your illustrious American historians. Only those who are ignorant of the history of Austria's violent usurpations were surprised by Italy's action, initiated by her victorious armies, or considered her just claims to be ambition for conquest. Italy faced the terrible sacrifices of blood and riches imposed by the war with that same religious spirit which animated all the deeds of her national resurrection, of which America's attainment of independence was so full.

Italy counts on the considered and tranquil judgment of American public opinion which, while justly desiring the return of peace, can not, if it examines the origin of the conflict and the problem raised thereby, wish that the European equilibrium, broken by violence in 1914, be replaced to-day by a premature and unfruitful peace containing the germs of graver conflicts in the future.

Persian Reply to President Wilson's Peace Note, January 15, 1917¹

His Imperial Majesty's Government has instructed me to communicate to your Excellency that it experienced the utmost pleasure upon

¹*The New York Times*, January 16, 1917.

receipt of the President's note of December 18, 1916, regarding peace terms transmitted through the United States plenipotentiary at Teheran, and to express to you the hope that a step so benevolent and humane will meet with the success it deserves.

I am further instructed to say that, notwithstanding we declared ourselves neutral, a large part of our country has been disturbed and devastated by the fighting of the belligerents within our boundaries. In view of this fact you can not doubt that we heartily welcome and indorse the move the President has made.

Furthermore, inasmuch as His Majesty's Government understands from the President's note that he desires the preservation of the integrity and freedom of the powers and the weaker nations, and in view of the firm friendship which has always existed between our two countries, it ardently hopes that the Government of the United States will assist our oppressed nation to maintain its integrity and rights, not only for the present, but whenever a peace conference shall take place.

**Extract from the Reply of the Greek Government to President
Wilson's Peace Note, January 16, 1917¹**

The Royal Government learns with the most lively interest of the steps which the President of the United States of America has just undertaken among the belligerents for the cessation of a long and cruel war which is ravishing humanity. Very sensitive to the communication made to it, the Royal Government deeply appreciates the generous courage as well as the extremely humanitarian and profoundly politic spirit which dictated that suggestion. The considerations given in it to the subject of the sufferings of neutral nations as a result of the colossal struggle, as well as guarantees which will be equally desired by both belligerent factions for the rights and privileges of all States, have particularly found a sympathetic echo in the soul of Greece. In fact, there is no country which, like Greece, has had to suffer from this war, while at the same time remaining a stranger to it.

Through circumstances exceptionally tragic, she has less than other neutral countries been able to escape a direct and pernicious effect from the hostilities between the belligerents. Her geographical posi-

¹*The New York Times*, January 17, 1917. For the reply of King Constantine, see *ante*, p. 42.

tion contributed toward diminishing her power of resistance against violations of her neutrality and sovereignty, which she has been forced to submit to in the interest of self-preservation.

The Royal Government would certainly have made all haste to accede to the noble demand of the President of the United States of America, to help with all means in its power until success were achieved, if it were not entirely out of communication with one of the two belligerents, while toward the other it must await the solution of difficulties which seriously weigh upon the situation in Greece. But the Royal Government is following with all the intensity of its soul the precious effort of the President of the United States of America, hoping to see it completed at the earliest possible moment.

President Wilson's Address to the Senate, January 22, 1917¹

Mr. President and gentlemen of the Senate: On the eighteenth of December last I addressed an identic note to the governments of the nations now at war requesting them to state, more definitely than they had yet been stated by either group of belligerents, the terms upon which they would deem it possible to make peace. I spoke on behalf of humanity and of the rights of all neutral nations like our own, many of whose most vital interests the war puts in constant jeopardy. The Central Powers united in a reply which stated merely that they were ready to meet their antagonists in conference to discuss terms of peace. The Entente Powers have replied much more definitely and have stated, in general terms, indeed, but with sufficient definiteness to imply details, the arrangements, guarantees, and acts of reparation which they deem to be the indispensable conditions of a satisfactory settlement. We are that much nearer a definite discussion of the peace which shall end the present war. We are that much nearer the discussion of the international concert which must thereafter hold the world at peace. In every discussion of the peace that must end this war it is taken for granted that that peace must be followed by some definite concert of power which will make it virtually impossible that any such catastrophe should ever overwhelm us again. Every lover of mankind, every sane and thoughtful man must take that for granted.

I have sought this opportunity to address you because I thought that I owed it to you, as the council associated with me in the final determination of our international obligations, to disclose to you without reserve the thought and purpose that have been taking form in

¹*Congressional Record*, January 22, 1917, p. 1947.

my mind in regard to the duty of our Government in the days to come when it will be necessary to lay afresh and upon a new plan the foundations of peace among the nations.

It is inconceivable that the people of the United States should play no part in that great enterprise. To take part in such a service will be the opportunity for which they have sought to prepare themselves by the very principles and purposes of their polity and the approved practices of their Government ever since the days when they set up a new nation in the high and honorable hope that it might in all that it was and did show mankind the way to liberty. They can not in honor withhold the service to which they are now about to be challenged. They do not wish to withhold it. But they owe it to themselves and to the other nations of the world to state the conditions under which they will feel free to render it.

That service is nothing less than this, to add their authority and their power to the authority and force of other nations to guarantee peace and justice throughout the world. Such a settlement can not now be long postponed. It is right that before it comes this Government should frankly formulate the conditions upon which it would feel justified in asking our people to approve its formal and solemn adherence to a League for Peace. I am here to attempt to state those conditions.

The present war must first be ended; but we owe it to candor and to a just regard for the opinion of mankind to say that, so far as our participation in guarantees of future peace is concerned, it makes a great deal of difference in what way and upon what terms it is ended. The treaties and agreements which bring it to an end must embody terms which will create a peace that is worth guaranteeing and preserving, a peace that will win the approval of mankind, not merely a peace that will serve the several interests and immediate aims of the nations engaged. We shall have no voice in determining what those terms shall be, but we shall, I feel sure, have a voice in determining whether they shall be made lasting or not by the guarantees of a universal covenant; and our judgment upon what is fundamental and essential as a condition precedent to permanency should be spoken now, not afterwards when it may be too late.

No covenant of cooperative peace that does not include the peoples of the New World can suffice to keep the future safe against war; and yet there is only one sort of peace that the peoples of America could join in guaranteeing. The elements of that peace must be elements that engage the confidence and satisfy the principles of the

American governments, elements consistent with their political faith and the practical convictions which the peoples of America have once for all embraced and undertaken to defend.

I do not mean to say that any American government would throw any obstacle in the way of any terms of peace the governments now at war might agree upon, or seek to upset them when made, whatever they might be. I only take it for granted that mere terms of peace between the belligerents will not satisfy even the belligerents themselves. Mere agreements may not make peace secure. It will be absolutely necessary that a force be created as a guarantor of the permanency of the settlement so much greater than the force of any nation now engaged or any alliance hitherto formed or projected that no nation, no probable combination of nations could face or withstand it. If the peace presently to be made is to endure, it must be a peace made secure by the organized major force of mankind.

The terms of the immediate peace agreed upon will determine whether it is a peace for which such a guarantee can be secured. The question upon which the whole future peace and policy of the world depends is this: Is the present war a struggle for a just and secure peace, or only for a new balance of power? If it be only a struggle for a new balance of power, who will guarantee, who can guarantee, the stable equilibrium of the new arrangement? Only a tranquil Europe can be a stable Europe. There must be, not a balance of power, but a community of power; not organized rivalries, but an organized common peace.

Fortunately we have received very explicit assurances on this point. The statesmen of both of the groups of nations now arrayed against one another have said, in terms that could not be misinterpreted, that it was no part of the purpose they had in mind to crush their antagonists. But the implications of these assurances may not be equally clear to all,—may not be the same on both sides of the water. I think it will be serviceable if I attempt to set forth what we understand them to be.

They imply, first of all, that it must be a peace without victory. It is not pleasant to say this. I beg that I may be permitted to put my own interpretation upon it and that it may be understood that no other interpretation was in my thought. I am seeking only to face realities and to face them without soft concealments. Victory would mean peace forced upon the loser, a victor's terms imposed upon the vanquished. It would be accepted in humiliation, under duress, at an intolerable sacrifice, and would leave a sting, a resentment, a bitter

memory upon which terms of peace would rest, not permanently, but only as upon quicksand. Only a peace between equals can last. Only a peace the very principle of which is equality and a common participation in a common benefit. The right state of mind, the right feeling between nations, is as necessary for a lasting peace as is the just settlement of vexed questions of territory or of racial and national allegiance.

The equality of nations upon which peace must be founded if it is to last must be an equality of rights; the guarantees exchanged must neither recognize nor imply a difference between big nations and small, between those that are powerful and those that are weak. Right must be based upon the common strength, not upon the individual strength, of the nations upon whose concert peace will depend. Equality of territory or of resources there of course can not be; nor any other sort of equality not gained in the ordinary peaceful and legitimate development of the peoples themselves. But no one asks or expects anything more than an equality of rights. Mankind is looking now for freedom of life, not for equipoises of power.

And there is a deeper thing involved than even equality of right among organized nations. No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property. I take it for granted, for instance, if I may venture upon a single example, that statesmen everywhere are agreed that there should be a united, independent, and autonomous Poland, and that henceforth inviolable security of life, of worship, and of industrial and social development should be guaranteed to all peoples who have lived hitherto under the power of governments devoted to a faith and purpose hostile to their own.

I speak of this, not because of any desire to exalt an abstract political principle which has always been held very dear by those who have sought to build up liberty in America, but for the same reason that I have spoken of the other conditions of peace which seem to me clearly indispensable,—because I wish frankly to uncover realities. Any peace which does not recognize and accept this principle will inevitably be upset. It will not rest upon the affections or the convictions of mankind. The ferment of spirit of whole populations will fight subtly and constantly against it, and all the world will sympathize. The world can be at peace only if its life is stable, and there can be no stability where the will is in rebellion, where there is not tranquillity of spirit and a sense of justice, of freedom, and of right.

So far as practicable, moreover, every great people now struggling towards a full development of its resources and of its powers should be assured a direct outlet to the great highways of the sea. Where this can not be done by the cession of territory, it can no doubt be done by the neutralization of direct rights of way under the general guarantee which will assure the peace itself. With a right comity of arrangement no nation need be shut away from free access to the open paths of the world's commerce.

And the paths of the sea must alike in law and in fact be free. The freedom of the seas is the *sine qua non* of peace, equality, and cooperation. No doubt a somewhat radical reconsideration of many of the rules of international practice hitherto thought to be established may be necessary in order to make the seas indeed free and common in practically all circumstances for the use of mankind, but the motive for such changes is convincing and compelling. There can be no trust or intimacy between the peoples of the world without them. The free, constant, unthreatened intercourse of nations is an essential part of the process of peace and of development. It need not be difficult either to define or to secure the freedom of the seas if the governments of the world sincerely desire to come to an agreement concerning it.

It is a problem closely connected with the limitation of naval armaments opens the wider and perhaps more difficult question of the seas at once free and safe. And the question of limiting naval armaments opens the wider and perhaps more difficult question of the limitation of armies and of all programs of military preparation. Difficult and delicate as these questions are, they must be faced with the utmost candor and decided in a spirit of real accommodation if peace is to come with healing in its wings, and come to stay. Peace can not be had without concession and sacrifice. There can be no sense of safety and equality among the nations if great preponderating armaments are henceforth to continue here and there to be built up and maintained. The statesmen of the world must plan for peace and nations must adjust and accommodate their policy to it as they have planned for war and made ready for pitiless contest and rivalry. The question of armaments, whether on land or sea, is the most immediately and intensely practical question connected with the future fortunes of nations and of mankind.

I have spoken upon these great matters without reserve and with the utmost explicitness because it has seemed to me to be necessary if the world's yearning desire for peace was anywhere to find free

voice and utterance. Perhaps I am the only person in high authority amongst all the peoples of the world who is at liberty to speak and hold nothing back. I am speaking as an individual, and yet I am speaking also, of course, as the responsible head of a great government, and I feel confident that I have said what the people of the United States would wish me to say. May I not add that I hope and believe that I am in effect speaking for liberals and friends of humanity in every nation and of every program of liberty? I would fain believe that I am speaking for the silent mass of mankind everywhere who have as yet had no place or opportunity to speak their real hearts out concerning the death and ruin they see to have come already upon the persons and the homes they hold most dear.

And in holding out the expectation that the people and Government of the United States will join the other civilized nations of the world in guaranteeing the permanence of peace upon such terms as I have named, I speak with the greater boldness and confidence because it is clear to every man who can think that there is in this promise no breach in either our traditions or our policy as a nation, but a fulfilment, rather, of all that we have professed or striven for.

I am proposing, as it were, that the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful.

I am proposing that all nations henceforth avoid entangling alliances which would draw them into competitions of power, catch them in a net of intrigue and selfish rivalry, and disturb their own affairs with influences intruded from without. There is no entangling alliance in a concert of power. When all unite to act in the same sense and with the same purpose all act in the common interest and are free to live their own lives under a common protection.

I am proposing government by the consent of the governed; that freedom of the seas which in international conference after conference representatives of the United States have urged with the eloquence of those who are the convinced disciples of liberty; and that moderation of armaments which makes of armies and navies a power for order merely, not an instrument of aggression or of selfish violence.

These are American principles, American policies. We could stand for no others. And they are also the principles and policies of forward

looking men and women everywhere, of every modern nation, of every enlightened community. They are the principles of mankind and must prevail.

**Speech of Viscount Motono, Japanese Minister for Foreign Affairs,
in the Diet, January 23, 1917¹**

The great war which has been ravaging Europe for two years and a half is an event without precedent in the history of humanity. Without doubt it will have incalculable effect upon the destiny of nations in the future; on the issue of this war will hang the liberty of nations. The question is whether the small and the great nations of Europe will be subjugated by Germany or not.

You all know the origin of the present war. The impossible demands of Austria-Hungary upon Serbia were apparently the cause of the taking up of arms by European nations, but the real cause was Germany's ambition for world domination for which preparations were being made for many years past. Germany cherishing great ambitions for the distant future, had seized upon Tsingtau in 1898 with the view of gobbling up the whole of China in time. That this has been so nobody will contend to-day. The great pan-Germanist propaganda, the elaborate and marvelous military preparations, these are no longer a secret.

In the summer of 1914 Germany thought that the time had come for imposing upon the world a powerful German domination; she thought that in a couple of months there would be an end of her enemies' resistance. All calculations were baffled and now at the end of two years and a half she finds herself forced to pursue the struggle anew.

Japan, at the first appeal from Great Britain, did not hesitate for a moment in coming to her aid; she has loyally accomplished her duty by her ally, our army and navy succeeded in a few months in bringing to naught the German resistance in our part of the world. In destroying the bases of German activity in China, Japan has secured the order and tranquillity of the extreme East. In cooperating with Great Britain in the destroying of the German fleet in the Pacific and the Indian Oceans Japan has greatly contributed to the assuring of the safety of mercantile trade in these seas not only for Japan and Great Britain but for all nations, allied and neutral. At a time when our enemies do not recoil from the most horrible means of destroy-

¹Furnished by the Imperial Japanese Embassy at Washington.

ing the trade by sea of the nations, the Pacific and the Indian oceans are free from German brigandage. I am persuaded that the civilized world will do us justice for the services rendered by Japan to the cause of humanity at large.

In declaring war on Germany and in acceding to the Declaration of London of the 5th of September, 1914, Japan has made her position clear in the formidable struggle. We have taken part in this war not merely for the defence of our particular interests but also for the defence of those of our allies, as well as the interests of humanity in general.

It is necessary that righteousness and justice should emerge victorious out of this merciless struggle; it is necessary that the world should be given to live in all tranquillity after this cataclysm. In order to attain this noble end there must be before everything a victory complete and definitive for our allied powers. Without a complete victory it need scarcely be remarked that the peace of the Far East for which we have made all manner of sacrifices will remain in real danger. And for obtaining this victory a sacred union not only of all the governments but also of the peoples ranged on our side in defence of the inseparable rights of humanity, is an essential condition.

In consenting to take part in this war, Japan was under the obligation, in view of her particular position in Asia, of limiting from the beginning her sphere of military action; but after having faithfully accomplished the task incumbent upon her she has made and will ever make every effort toward the attainment of the final victory by her allies. The struggle between the allies and the common enemies is not one simply of military and naval forces, but it is a struggle extending over all spheres of human activities. It is the reason why we should march forward in every direction in an accord as complete as possible. Hence it is that we have adhered to the resolutions of the Economic Conference of Paris. It is for that reason again that the Imperial Government have taken some administrative measures with a view to safeguarding our common interests in the matter of postal and telegraphic communications. It is also with that end in view that the Government are contemplating to take other and different measures in consequence of the Economic Conference. It was further for the purpose of keeping in more complete accord with our allies that the Imperial Government gave a prompt assent to the project of the response, proposed by the French Government in the name of the allies, to the German and American notes. The rea-

sons that caused our refusal toward the German proposal have been clearly stated in the identic note. The Imperial Government consider with the allied governments that the pretensions of the hostile governments are inadmissible and that the time has not yet come for entering upon peace negotiations. With your permission I will next say a few words in regard to our reply to the American note. While highly approving the elevated sentiments which inspired this *démarche* of the American Government, the allied governments did not feel bound to accede to the desire of peace expressed by that government. The reasons for this decision on their part were set forth in the note forwarded in Paris to the American Ambassador by the French Government in the name of the allied powers. In the reply to the American Government, the allied powers state a certain number of conditions which they consider it indispensable to impose on the hostile governments on the occasion of the conclusion of peace. The absence of all reference to the future disposition of the German colonies has justly attracted the attention of the Japanese public, neither has it escaped the notice of the Imperial Government. The reply to the American note by no means contains all the conditions of peace. The allied powers have reserved the right to present the conditions in detail at the time of the peace negotiations. This last point is indicated in the note to America. The Imperial Government, when they adhered to the project of the response to the American note, knew that the allied powers had not neglected to take into proper consideration the just claims which Japan would present at the peace negotiations. Nevertheless to clear away all misunderstanding on this point, we took the necessary measures, in sending our reply of adhesion to the French Government, for safeguarding our rights, and I am happy to be able to assure you that a most satisfactory understanding exists on this subject among all the allies at a moment when the allied powers have taken the decision of continuing the war until the victory of justice and righteousness as well as true peace of the world has been realized. I would most eagerly express our sentiments of the most sincere appreciation for the efforts displayed by Great Britain, France, Russia, Italy, Belgium, Serbia, Montenegro and Roumania. At the same time I would express our most profound admiration for their brave armies and navies. I also wish to testify to our hearty sympathy for the inhabitants of the regions fouled by the foot of the cruel and barbarous invaders and I am firmly persuaded that a future more glorious is in store for these unfortunate peoples.

It is needless for me to state that our alliance with Great Britain is the basis of our foreign policy. The present war has demonstrated the solidity as well as the benefits of this alliance. The Japanese and the British people have realized in the most evident manner the necessity of this alliance for the protection of the rights and interests of the two empires. It is at the same time an essential guaranty for the maintenance of the order and peace of the extreme Orient.

We must also felicitate ourselves upon the understanding signed between Japan and Russia in July, 1916. All the succeeding cabinets of Japan since the end of the Russian war have pursued the policy of *rapprochement* with that nation. The two governments of Japan and Russia saw the necessity of this policy immediately after the conclusion of peace. Inaugurated by our first entente in 1907, this policy has been uniformly pursued and enhanced by the successive ententes which finally led to the Convention of 1916, concluded amidst events destined to produce incalculable consequences upon Russia. This convention has had the effect of enlightening the public opinion of Russia to the perception of the sincerity of the Japanese sentiments. I do not hesitate to state to you that the government and people of Russia testify a profound sense of gratitude to Japan for the great services rendered to Russia in our furnishing her with ammunitions which facilitated her military operations. Having been a personal observer for more than two years of the evolution of the Russian mentality, I believe I am able to affirm to you that the Russian nation entertain the most sincere and frank amity toward Japan. Japan and Russia have great interests in common to be safeguarded in the Far East. This intimate accord between the two nations, no less than the Anglo-Japanese alliance, constitutes an indispensable guaranty for peace in our part of the world in spite of the troubled times amidst which we find ourselves.

I am happy to be able to state to you that our relations with the neutral powers are more than ever cordial. I am persuaded that all the neutral nations will do us full justice for the immense service done by our navy for their foreign commerce. If we had not, in concert with the British navy, destroyed the German fleet in the Pacific, where would the maritime commerce of the neutral countries be, especially of countries such as America, Australia and China, which border upon the Pacific? I am firmly convinced that all the neutral powers that have profited by the security of the seas assured by the two navies, will recognize the justice of what I have just stated to you.

You are aware that Japan has always preserved the most sincerely amicable relations with the government and the people of America, though from time to time there have been light clouds which have cast a shadow upon our relations though ever so little. These clouds have generally been dissipated by the common good-will of the two governments. There certainly have been questions about which the two governments could not come to a complete accord, but that will be the case between even the best of allies. However, when one faces the most thorny questions in a friendly and frank spirit, with the will of solving them in an amicable and conciliatory manner, there will surely be found a way to an understanding. It is this end that the two governments have always pursued to the great satisfaction of our two countries. It affords me great pleasure to state that there have been symptoms of more real sympathy manifested of late between the countries. As one instance we have been approached by the American capitalists for cooperation in financial affairs in China. The Imperial Government are watching with lively interest the further development of the economic *rapprochement* between the two countries.

I would not speak of all the events that have come to pass in China in recent years, which must be still fresh in your memory. We must recognize that as the result of these events there has been created a certain atmosphere which is not altogether desirable. It is for the good of our two countries that this state of things should absolutely disappear. In view of the great political and economic interests which Japan possesses in China, it has always been the sincere desire of this country to see her neighbor developed along the paths of modern civilization and we have spared no efforts for that purpose. It was for that purpose also that we sent to China a number of civil and military advisors, and that we concurred with other countries in furnishing China with the financial means of accomplishing reforms of every kind and also that we undertook the education and instruction of the young Chinese students who are coming to Japan by thousands. Nobody would contradict me when I say that China certainly is indebted much to Japan in her work of reorganization pursued for several years. Why is it that in spite of all our well-meant efforts, China seems often to regard us with mistrust and even animosity? There may be many causes for that, but the chief reason, to my mind, is the tendency on the part of the Japanese towards interference in China's internal quarrels since the overthrow of the Manchu Dynasty and the establishment of the republican *régime*. There have since been formed in China a number of political parties, for one or another

of which parties there have been some Japanese who have expressed sympathy. These persons have developed marked tendency towards a desire to help these political parties to obtain power according as their own political opinions or personal sympathy dictate. I am persuaded that all these persons are perfectly sincere in their desire of helping our neighboring friends, but the results were deplorable. To what did our attitude at the moment of the formation of the Republic lead, and to what did all the movements inimical to the President lead? You are aware of it so well that I need not dwell upon it. But what I have to state is that in the wake of all these facts we have had no other results than to invite, on the one hand, the animosity of our neighbors and, on the other, to cause other nations' misunderstanding of the real intentions of Japan. I do not hesitate to state that the present Cabinet absolutely repudiate this mode of action. We desire to maintain the most cordial relations with China. We desire nothing more than the gradual accomplishment by China of all her schemes of reform, and we shall leave nothing undone in order to help her in the task, if she so desires. Endeavors shall not be wanting on our part to make China comprehend the sincerity of our sentiments toward her, though it must always remain with China whether she should have faith in us or not. We have not the least intention, I formally declare hereby, of favoring this or that political party in China; all we desire is the maintenance of cordial relations of amity with China herself and not with any political party. It is essential that China should develop herself smoothly along the path of progress and we dread nothing more than the possible disintegration of China through her continued troubles. We must put forth every effort to prevent that sad possibility, for nothing is more indispensable than that China should maintain her independence and territorial integrity. The other point to which the government must call your attention is the special position occupied by Japan in certain portions of China. I am speaking especially of South Manchuria and East Inner Mongolia. Our special situation in these parts has been acquired at the cost of immense sacrifice and immeasurable efforts on our part and on the strength of this circumstance our rights and interests in these parts have been consecrated by treaties and arrangements. It is therefore the most elementary duty of the Imperial Government toward the nation to safeguard these rights and interests. In the same way it is necessary that China should comprehend that it is not only a matter of compliance with international duty that China should respect these rights and interests of Japan, but it would be

nothing more than the realization of the good understanding between our two countries.

If China would continue, as we sincerely desire she would, relations of the greatest confidence and amity with Japan, it is necessary that she should follow the same lines of conduct as those we intend to follow with her. It is on this condition alone that anything like a firm understanding can exist between us. The Imperial Government have the strongest conviction that if the Chinese Government understood the pure and clear intentions of Japan, China would not have any objection to Japan's sincere policy of good understanding in the relations between Japan and China. Nobody certainly would dispute the fact that Japan occupies a peculiar position in China as well on account of her geographic position as her political and economic interests; but we must not any more ignore the fact that other powers have likewise immense interests in China. We must, therefore, while safeguarding our own interests there, take care to respect those of other nations. We must before everything try to move in accord with powers with which we are under the pledge of special arrangements and in a general way endeavor to reconcile our interests with those of others. We are firmly convinced that such is the line of conduct best suited to the common interests of all powers concerned. Japan has not any intention to follow an egoistic policy in China. It is her sincere desire to keep in complete accord with the countries concerned, and the Imperial Government firmly believe that with good-will on both sides we shall be able to arrive at a complete understanding which will be for the best interests both of China and all other countries.

Extract from the Speech of Bonar Law, Chancellor of the Exchequer, Bristol, England, January 24, 1917¹

We are working for, looking forward to peace. The Germans the other day made us what they call an offer of peace. It received from the Allied Governments the only reply which was possible. You have read the speech made by President Wilson. It was a frank speech, and it is right that any member of an Allied Government who refers to it should speak frankly too. It is impossible that he and we can look on this question from the same point of view. Whatever his private feeling may be, the head of a great neutral State must take a neutral attitude. America is very far removed from the horrors of

¹*The Times*, London, January 25, 1917.

this war; we are in the midst of it. America is neutral; we are not neutral. We believe that the essence of this conflict is the question, which is as old as time, of the difference between right and wrong. We know that this is a war of naked aggression. We know that the crimes which have accompanied the conduct of the war—crimes almost incredible after 2,000 years of Christianity—are small in comparison with the initial crime by which the men responsible for the policy of Germany with cold-blooded calculation, because they thought it would pay, plunged the world into the horrors we are enduring.

President Wilson's aim is to have peace now and security for peace in the future. That is our aim also, and it is our only aim. He hopes to secure it by means of a league of peace among the nations, and he is trying to get the American Senate to do something to make this possible. It would not be right, in my opinion, for us to look upon that suggestion as altogether Utopian. You know that until quite recently duelling was common. Now the idea that private quarrels should be settled by the sword is unthinkable. But, after all, it is for us not an abstract question for the future. It is a question of life or death now; and whether we consider that the aim which he and we have in common can be secured by his methods, we can not forget the past. For generations humane men, men of good-will among all nations have striven, by Hague Conventions, by peace conferences, by every means, to make war impossible. I said humane men. They have striven, if not to make it impossible, to mitigate its horrors and to see how the barriers against barbarism could be maintained.

At the outbreak of war Germany swept aside every one of those barriers and tore up the scraps of paper which she had solemnly signed. She spread mines in the open sea; on sea and land she committed atrocities, incredible atrocities, contrary to conventions which she had herself signed. At this moment she is driving the populations of enemy territory into slavery, and, worse than that, in some cases she is making the subjects of the Allies take up arms against their own country. All that has happened and no neutral country has been able to stop it, and, more than that, no neutral country has made any protest, at least no effective protest. It is for us a question of life or death. We must have stronger guarantees for the future peace of the world.

We have rejected the proposal to enter into peace negotiations not from any lust of conquest, not from any longing for shining victories; we have rejected it not from any feeling of vindictiveness or even a desire for revenge; we have rejected it because peace now would mean

peace based upon a German victory. It would mean a military machine which is still unbroken, it would mean also that that machine would be in the hands of a nation prepared for war, who would set about preparing for it again, and, at their own time, plunge us again into the miseries which we are enduring to-day. What President Wilson is longing for we are fighting for. . . .

Our sons and brothers are dying for it, and we mean to secure it. The heart of the people of our country is longing for peace. We are praying for peace, a peace that will bring back in safety those who are dear to us, but a peace which will mean this—that those who will never come back shall not have laid down their lives in vain.

**Speech of Premier Tisza in the Hungarian Parliament,
January 25, 1917¹**

Pursuant to our peaceful policy before the war and our attitude during the war, as well as our recent peace action, we can only greet with sympathy every effort aiming at the restoration of peace. We are, therefore, inclined to continue a further exchange of views regarding peace with the United States Government. This exchange must naturally occur in agreement with our allies.

In view of the fact that President Wilson in his address makes certain distinctions between our reply and our enemies' reply, I must especially state that the quadruple alliance declares that it is inclined to enter into peace negotiations, but that at the same time it will propose terms which, in its opinion, are acceptable for the enemy and calculated to serve as a basis for a lasting peace.

On the other hand, the conditions of peace contained in our enemies' reply to the United States are equivalent at least to the disintegration of our monarchy and of the Ottoman Empire. This amounts to an official announcement that the war aims at our destruction, and we are, therefore, forced to resist with our utmost strength as long as this is the war aim of our enemies.

In such circumstances it can not be doubted which group of powers by its attitude is the obstacle to peace, and this group approximates to President Wilson's conception. The President opposes a peace imposed by a conqueror, which one party would regard as a humiliation and an intolerable sacrifice. From this it follows clearly that so long as the powers opposed to us do not substantially change their war

¹*The New York Times*, January 26, 1917.

aims an antagonism that can not be bridged stands between their viewpoint and the President's peace aims.

My second observation has to do with the principle of nationalities. I desire to be brief; therefore, I will not dilate on the question of what moral justification England and Russia have to lay stress on the principle of nationalities in a peace program which would destroy the Hungarian nation and deliver the Mohammedan population of the Bosphorus region into Russian domination. But I say that the whole public opinion in Hungary holds to the principle of nationalities in honor.

The principle of nationalities in the formation of national States, however, can only prevail unrestrictedly where single nations live within sharply marked ethnographical boundaries in compact masses and in regions suited to the organization of a State. In territories where various races live intermingled it is impossible that every single race can form a national State. In such territories it would only be possible to create a State without national character, or one in which a race by its numbers and importance predominates, thus imprinting its national character.

In such circumstances, therefore, only that limited realization of the principle of nationalities is possible which the President of the United States rightfully expresses in demanding that security of life and religion and individual and social development should be guaranteed to all peoples. I believe that nowhere is this demand realized to such a degree as in both States of the monarchy. I believe that in the regions of Southeastern Europe, which are inhabited by a varied mixture of peoples and nations, the demand for free development of nations can not be more completely realized than it is by the existence and domination of the Austro-Hungarian monarchy.

We feel ourselves, therefore, completely in agreement with the President's demands. We shall strive for the realization as far as possible of this principle in the regions lying in our immediate neighborhood. I can only repeat that, true to our traditional foreign policy and true to the standpoint we took in our peace action in conjunction with our allies, we are ready to do everything that will guarantee to the peoples of Europe the blessings of a lasting peace.

I beg you to take cognizance of my reply.

**German Note to the United States regarding the Submarine
Blockade, January 31, 1917¹**

[TRANSLATION]

GERMAN EMBASSY,

Washington, January 31, 1917.

MR. SECRETARY OF STATE: Your Excellency was good enough to transmit to the Imperial Government a copy of the message which the President of the United States of America addressed to the Senate on the 22, inst. The Imperial Government has given it the earnest consideration which the President's statements deserve, inspired as they are, by a deep sentiment of responsibility. It is highly gratifying to the Imperial Government to ascertain that the main tendencies of this important statement correspond largely to the desires and principles professed by Germany. These principles especially include self-government and equality of rights for all nations. Germany would be sincerely glad if in recognition of this principle countries like Ireland and India, which do not enjoy the benefits of political independence, should now obtain their freedom. The German people also repudiate all alliances which serve to force the countries into a competition for might and to involve them in a net of selfish intrigues. On the other hand Germany will gladly cooperate in all efforts to prevent future wars. The freedom of the seas, being a preliminary condition of the free existence of nations and the peaceful intercourse between them, as well as the open door for the commerce of all nations, has always formed part of the leading principles of Germany's political program. All the more the Imperial Government regrets that the attitude of her enemies who are so entirely opposed to peace makes it impossible for the world at present to bring about the realization of these lofty ideals. Germany and her allies were ready to enter now into a discussion of peace and had set down as basis the guaranty of existence, honor and free development of their peoples. Their aims, as has been expressly stated in the note of December 12, 1916, were not directed towards the destruction or annihilation of their enemies and were according to their conviction perfectly compatible with the rights of the other nations. As to Belgium for which such warm and cordial sympathy is felt in the United States, the Chancellor had declared only a few weeks previously that its annexation had never formed part of Germany's intentions. The peace to be signed with Belgium was to provide for such conditions.

¹Official print of the Department of State.

in that country, with which Germany desires to maintain friendly neighborly relations, that Belgium should not be used again by Germany's enemies for the purpose of instigating continuous hostile intrigues. Such precautionary measures are all the more necessary, as Germany's enemies have repeatedly stated not only in speeches delivered by their leading men, but also in the statutes of the economical conference in Paris, that it is their intention not to treat Germany as an equal, even after peace has been restored but to continue their hostile attitude and especially to wage a systematical economical war against her.

The attempt of the four allied powers to bring about peace has failed owing to the lust of conquest of their enemies, who desired to dictate the conditions of peace. Under the pretense of following the principle of nationality our enemies have disclosed their real aims in this war, viz., to dismember and dishonor Germany, Austria-Hungary, Turkey and Bulgaria. To the wish of reconciliation they oppose the will of destruction. They desire a fight to the bitter end.

A new situation has thus been created which forces Germany to new decisions. Since two years and a half England is using her naval power for a criminal attempt to force Germany into submission by starvation. In brutal contempt of international law the group of Powers led by England does not only curtail the legitimate trade of their opponents but they also by ruthless pressure compel neutral countries either to altogether forego every trade not agreeable to the Entente Powers or to limit it according to their arbitrary decrees. The American Government knows the steps which have been taken to cause England and her allies to return to the rules of international law and to respect the freedom of the seas. The English Government, however, insists upon continuing its war of starvation, which does not at all affect the military power of its opponents, but compels women and children, the sick and the aged to suffer, for their country, pains and privations which endanger the vitality of the nation. Thus British tyranny mercilessly increases the sufferings of the world indifferent to the laws of humanity, indifferent to the protests of the neutrals whom they severely harm, indifferent even to the silent longing for peace among England's own allies. Each day of the terrible struggle causes new destruction, new sufferings. Each day shortening the war will, on both sides, preserve the life of thousands of brave soldiers and be a benefit to mankind.

The Imperial Government could not justify before its own conscience, before the German people and before history the neglect of

any means destined to bring about the end of the war. Like the President of the United States, the Imperial Government had hoped to reach this goal by negotiations. After the attempts to come to an understanding with the Entente Powers have been answered by the latter with the announcement of an intensified continuation of the war, the Imperial Government—in order to serve the welfare of mankind in a higher sense and not to wrong its own people—is now compelled to continue the fight for existence, again forced upon it, with the full employment of all the weapons which are at its disposal.

Sincerely trusting that the people and Government of the United States will understand the motives for this decision and its necessity, the Imperial Government hopes that the United States may view the new situation from the lofty heights of impartiality and assist, on their part, to prevent further misery and avoidable sacrifice of human life.

Enclosing two memoranda regarding the details of the contemplated military measures at sea, I remain, etc.,

(Signed) J. BERNSTORFF.

[INCLOSURE 1]

MEMORANDUM

After bluntly refusing Germany's peace offer the Entente Powers, stated in their note addressed to the American Government, that they are determined to continue the war in order to deprive Germany of German provinces in the West and the East, to destroy Austria-Hungary and to annihilate Turkey. In waging war with such aims, the Entente Allies are violating all rules of international law, as they prevent the legitimate trade of neutrals with the Central Powers, and of the neutrals among themselves. Germany has, so far, not made unrestricted use of the weapon which she possesses in her submarines. Since the Entente Powers, however, have made it impossible to come to an understanding based upon equality of rights of all nations, as proposed by the Central Powers and have instead declared only such a peace to be possible, which shall be dictated by the Entente Allies and shall result in the destruction and humiliation of the Central Powers, Germany is unable further to forego the full use of her submarines. The Imperial Government, therefore, does not doubt that the Government of the United States will understand the situation thus forced upon Germany by the Entente Allies' brutal methods of war and by their determination to destroy the Central Powers, and that the Government of the United States will further realize that the

now openly disclosed intentions of the Entente Allies give back to Germany the freedom of the action which she reserved in her note addressed to the Government of the United States on May 4, 1916.

Under these circumstances Germany will meet the illegal measures of her enemies by forcibly preventing after February 1, 1917, in a zone around Great Britain, France, Italy and in the Eastern Mediterranean all navigation, that of neutrals included, from and to England and from and to France, etc., etc. All ships met within that zone will be sunk.

The Imperial Government is confident that this measure will result in a speedy termination of the war and in the restoration of peace which the Government of the United States has so much at heart. Like the Government of the United States, Germany and her allies had hoped to reach this goal by negotiations. Now that the war, through the fault of Germany's enemies, has to be continued, the Imperial Government feels sure that the Government of the United States will understand the necessity of adopting such measures and are destined to bring about a speedy end of the horrible and useless bloodshed. The Imperial Government hopes all the more for such an understanding of her position, as the neutrals have under the pressure of the Entente Powers, suffered great losses, being forced by them either to give up their entire trade or to limit it according to conditions arbitrarily determined by Germany's enemies in violation of international law.

[INCLOSURE 2]

MEMORANDUM

From February 1, 1917, all sea traffic will be stopped with every available weapon and without further notice in the following blockade zones around Great Britain, France, Italy and in the Eastern Mediterranean.

In the North: The zone is confined by a line at a distance of 20 sea miles along the Dutch coast to Terschelling fire ship, the degree of longitude from Terschelling fire ship to Uksire, a line from there across the point 62 degrees north 0 degrees longitude to 62 degrees north 5 degrees west, further to a point 3 sea miles south of the southern point of the Faroe Islands, from there across point 62 degrees north 10 degrees west to 61 degrees north 15 degrees west, then 57 degrees north 20 degrees west to 47 degrees north 20 degrees west, further to 43 degrees north, 15 degrees west, then along the degree of latitude 43 degrees north to 20 sea miles from Cape Finisterre and

at a distance of 20 sea miles along the north coast of Spain to the French boundary.

In the South: The Mediterranean

For neutral ships remains open: The sea west of the line Pt. del'Espiquette to 38 degrees 20 minutes north and 6 degrees east, also north and west of a zone 61 sea miles wide along the north African coast, beginning at 2 degrees longitude west. For the connection of this sea zone with Greece there is provided a zone of a width of 20 sea miles north and east of the following line: 38 degrees north and 6 degrees east to 38 degrees north and 10 degrees east to 37 degrees north and 11 degrees 30 minutes east to 34 degrees north and 11 degrees 30 minutes east to 34 degrees north and 22 degrees 30 minutes east.

From there leads a zone 20 sea miles wide west of 22 degrees 30 minutes eastern longitude into Greek territorial waters.

Neutral ships navigating these blockade zones do so at their own risk. Although care has been taken, that neutral ships which are on their way toward ports of the blockade zones on February 1, 1917, and have come in the vicinity of the latter, will be spared during a sufficiently long period it is strongly advised to warn them with all available means in order to cause their return.

Neutral ships which on February 1, are in ports of the blockaded zones, can, with the same safety, leave them if they sail before February 5, 1917, and take the shortest route into safe waters.

The instructions given to the commanders of German submarines provide for a sufficiently long period during which the safety of passengers on unarmed enemy passenger ships is guaranteed.

Americans, en route to the blockade zone on enemy freight steamers, are not endangered, as the enemy shipping firms can prevent such ships in time from entering the zone.

Sailing of regular American passenger steamers may continue undisturbed after February 1, 1917, if

- a) the port of destination is Falmouth
- b) sailing to or coming from that port course is taken via the Scilly Islands and a point 50 degrees north 20 degrees west,
- c) the steamers are marked in the following way which must not be allowed to other vessels in American ports: On ships' hull and superstructure 3 vertical stripes 1 meter wide each to be painted alternately white and red. Each mast should show a large flag checkered white and red, and the stern the American national flag.

- Care should be taken that, during dark, national flag and painted marks are easily recognizable from a distance and that the boats are well lighted throughout,
- d) one steamer a week sails in each direction with arrival at Falmouth on Sunday and departure from Falmouth on Wednesday
 - e) The United States Government guarantees that no contraband (according to German contraband list) is carried by those steamers.

President Wilson's Address to Both Houses of Congress in Joint Session, February 3, 1917¹

GENTLEMEN OF THE CONGRESS: The Imperial German Government on the thirty-first of January announced to this Government and to the governments of the other neutral nations that on and after the first day of February, the present month, it would adopt a policy with regard to the use of submarines against all shipping seeking to pass through certain designated areas of the high seas to which it is clearly my duty to call your attention.

Let me remind the Congress that on the eighteenth of April last, in view of the sinking on the twenty-fourth of March of the cross-channel passenger steamer *Sussex* by a German submarine without summons or warning, and the consequent loss of the lives of several citizens of the United States who were passengers aboard her, this Government addressed a note to the Imperial German Government in which it made the following declaration:

"If it is still the purpose of the Imperial Government to prosecute relentless and indiscriminate warfare against vessels of commerce by the use of submarines without regard to what the Government of the United States must consider the sacred and indisputable rules of international law and the universally recognized dictates of humanity, the Government of the United States is at last forced to the conclusion that there is but one course it can pursue. Unless the Imperial Government should now immediately declare and effect an abandonment of its present methods of submarine warfare against passenger and freight-carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Empire altogether."

¹*Congressional Record*, February 3, 1917, p. 1917.

In reply to this declaration the Imperial German Government gave this Government the following assurance:

"The German Government is prepared to do its utmost to confine the operations of war for the rest of its duration to the fighting forces of the belligerents, thereby also insuring the freedom of the seas, a principle upon which the German Government believes, now as before, to be in agreement with the Government of the United States.

"The German Government, guided by this idea, notifies the Government of the United States that the German naval forces have received the following orders: In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.

"But," it added, "neutrals can not expect that Germany, forced to fight for her existence, shall, for the sake of neutral interest, restrict the use of an effective weapon if her enemy is permitted to continue to apply at will methods of warfare violating the rules of international law. Such a demand would be incompatible with the character of neutrality, and the German Government is convinced that the Government of the United States does not think of making such a demand, knowing that the Government of the United States has repeatedly declared that it is determined to restore the principle of the freedom of the seas, from whatever quarter it has been violated."

To this the Government of the United States replied on the eighth of May, accepting, of course, the assurances given, but adding,

"The Government of the United States feels it necessary to state that it takes it for granted that the Imperial German Government does not intend to imply that the maintenance of its newly announced policy is in any way contingent upon the course or result of diplomatic negotiations between the Government of the United States and any other belligerent Government, notwithstanding the fact that certain passages in the Imperial Government's note of the 4th instant might appear to be susceptible of that construction. In order, however, to avoid any possible misunderstanding, the Government of the United States notifies the Imperial Government that it can not for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas should in any way or in the slightest degree be made

contingent upon the conduct of any other Government affecting the rights of neutrals and non-combatants. Responsibility in such matters is single, not joint; absolute, not relative."

To this note of the eighth of May the Imperial German Government made no reply.

On the thirty-first of January, the Wednesday of the present week, the German Ambassador handed to the Secretary of State, along with a formal note, a memorandum which contains the following statement:

"The Imperial Government, therefore, does not doubt that the Government of the United States will understand the situation thus forced upon Germany by the Entente Allies' brutal methods of war and by their determination to destroy the Central Powers, and that the Government of the United States will further realize that the now openly disclosed intentions of the Entente Allies give back to Germany the freedom of action which she reserved in her note addressed to the Government of the United States on May 4, 1916."

"Under these circumstances Germany will meet the illegal measures of her enemies by forcibly preventing after February 1, 1917, in a zone around Great Britain, France, Italy, and in the Eastern Mediterranean all navigation, that of neutrals included, from and to England and from and to France, etc., etc. All ships met within the zone will be sunk."

I think that you will agree with me that, in view of this declaration, which suddenly and without prior intimation of any kind deliberately withdraws the solemn assurance given in the Imperial Government's note of the fourth of May, 1916, this Government has no alternative consistent with the dignity and honour of the United States but to take the course which, in its note of the eighteenth of April, 1916, it announced that it would take in the event that the German Government did not declare and effect an abandonment of the methods of submarine warfare which it was then employing and to which it now purposes again to resort.

I have, therefore, directed the Secretary of State to announce to His Excellency the German Ambassador that all diplomatic relations between the United States and the German Empire are severed, and that the American Ambassador at Berlin will immediately be withdrawn; and, in accordance with this decision, to hand to His Excellency his passports.

Notwithstanding this unexpected action of the German Government, this sudden and deeply deplorable renunciation of its assur-

ances, given this Government at one of the most critical moments of tension in the relations of the two governments, I refuse to believe that it is the intention of the German authorities to do in fact what they have warned us they feel at liberty to do. I can not bring myself to believe that they will indeed pay no regard to the ancient friendship between their people and our own or to the solemn obligations which have been exchanged between them and destroy American ships and take the lives of American citizens in the wilful prosecution of the ruthless naval programme they have announced their intention to adopt. Only actual overt acts on their part can make me believe it even now.

If this inveterate confidence on my part in the sobriety and prudent foresight of their purpose should unhappily prove unfounded; if American ships and American lives should in fact be sacrificed by their naval commanders in heedless contravention of the just and reasonable understandings of international law and the obvious dictates of humanity, I shall take the liberty of coming again before the Congress, to ask that authority be given me to use any means that may be necessary for the protection of our seamen and our people in the prosecution of their peaceful and legitimate errands on the high seas. I can do nothing less. I take it for granted that all neutral governments will take the same course.

We do not desire any hostile conflict with the Imperial German Government. We are the sincere friends of the German people and earnestly desire to remain at peace with the Government which speaks for them. We shall not believe that they are hostile to us unless and until we are obliged to believe it; and we purpose nothing more than the reasonable defense of the undoubted rights of our people. We wish to serve no selfish ends. We seek merely to stand true alike in thought and in action to the immemorial principles of our people which I sought to express in my address to the Senate only two weeks ago,—seek merely to vindicate our right to liberty and justice and an unmolested life. These are the bases of peace, not war. God grant we may not be challenged to defend them by acts of wilful injustice on the part of the Government of Germany!

**Severance of Diplomatic Relations between the United States and
Germany, February 3, 1917**

*The Secretary of State to the German Ambassador*¹

DEPARTMENT OF STATE,
Washington, February 3, 1917.

EXCELLENCY: In acknowledging the note with accompanying memoranda, which you delivered into my hands on the afternoon of January 31st, and which announced the purpose of your Government as to the future conduct of submarine warfare, I would direct your attention to the following statements appearing in the correspondence which has passed between the Government of the United States and the Imperial German Government in regard to submarine warfare.

This Government on April 18, 1916, in presenting the case of the *Sussex*, declared—

“If it is still the purpose of the Imperial Government to prosecute relentless and indiscriminate warfare against vessels of commerce by the use of submarines without regard to what the Government of the United States must consider the sacred and indisputable rules of international law and the universally recognized dictates of humanity, the Government of the United States is at last forced to the conclusion that there is but one course it can pursue. Unless the Imperial Government should now immediately declare and effect an abandonment of its present methods of submarine warfare against passenger and freight-carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Empire altogether.”

In reply to the note from which the above declaration is quoted Your Excellency's Government stated in a note dated May 4, 1916—

“The German Government, guided by this idea, notifies the Government of the United States that the German naval forces have received the following orders: In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.

“But neutrals can not expect that Germany, forced to fight for her existence, shall, for the sake of neutral interests, restrict the use of an effective weapon if her enemy is permitted to continue to

¹Official print of the Department of State.

apply at will methods of warfare violating the rules of international law. Such a demand would be incompatible with the character of neutrality, and the German Government is convinced that the Government of the United States does not think of making such a demand, knowing that the Government of the United States has repeatedly declared that it is determined to restore the principle of the freedom of the seas, from whatever quarter it has been violated."

To this reply this Government made answer on May 8, 1916, in the following language:

"The Government of the United States feels it necessary to state that it takes it for granted that the Imperial German Government does not intend to imply that the maintenance of its newly announced policy is in any way contingent upon the course or result of diplomatic negotiations between the Government of the United States and any other belligerent Government, notwithstanding the fact that certain passages in the Imperial Government's note of the 4th instant might appear to be susceptible of that construction. In order, however, to avoid any possible misunderstanding, the Government of the United States notifies the Imperial Government that it can not for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas should in any way or in the slightest degree be made contingent upon the conduct of any other Government affecting the rights of neutrals and non-combatants. Responsibility in such matters is single, not joint; absolute, not relative."

To this Government's note of May 8th no reply was made by the Imperial Government.

In one of the memoranda accompanying the note under acknowledgment, after reciting certain alleged illegal measures adopted by Germany's enemies, this statement appears:

"The Imperial Government, therefore, does not doubt that the Government of the United States will understand the situation thus forced upon Germany by the Entente Allies' brutal methods of war and by their determination to destroy the Central Powers, and that the Government of the United States will further realize that the now openly disclosed intentions of the Entente Allies give back to Germany the freedom of action which she reserved in her note addressed to the Government of the United States on May 4, 1916,

"Under these circumstances Germany will meet the illegal measures of her enemies by forcibly preventing, after February 1, 1917, in a zone around Great Britain, France, Italy, and in the eastern

Mediterranean all navigation, that of neutrals included, from and to England and from and to France, etc., etc. All ships met within the zone will be sunk."

In view of this declaration, which withdraws suddenly and without prior intimation the solemn assurance given in the Imperial Government's note of May 4, 1916, this Government has no alternative consistent with the dignity and honor of the United States but to take the course which it explicitly announced in its note of April 18, 1916, it would take in the event that the Imperial Government did not declare and effect an abandonment of the methods of submarine warfare then employed and to which the Imperial Government now purpose again to resort.

The President has, therefore, directed me to announce to Your Excellency that all diplomatic relations between the United States and the German Empire are severed, and that the American ambassador at Berlin will be immediately withdrawn, and in accordance with such announcement to deliver to Your Excellency your passports.

I have, etc.,

ROBERT LANSING.

Instructions to American Diplomatic Representatives in Neutral Countries, February 4, 1917, regarding the Severance of Diplomatic Relations between the United States and Germany¹

You will immediately notify the Government to which you are accredited that the United States, because of the German Government's recent announcement of its intention to renew unrestricted submarine warfare, has no choice but to follow the course laid down in its note of April 18, 1916 (the *Sussex* note).

It has, therefore, recalled the American Ambassador to Berlin and has delivered passports to the German Ambassador to the United States.

Say, also, that the President is reluctant to believe Germany actually will carry out her threat against neutral commerce, but if it be done the President will ask Congress to authorize use of the national power to protect American citizens engaged in their peaceful and lawful errands on the seas.

The course taken is, in the President's view, entirely in conformity with the principles he enunciated in his address to the Senate January 12 (the address proposing a world league for peace).

¹*Congressional Record*, February 8, 1917, p. 3263.

He believes it will make for the peace of the world if other neutral powers can find it possible to take similar action.

Report fully and immediately on the reception of this announcement and upon the suggestion as to similar action.

**Senate Resolution of February 7, 1917, endorsing President Wilson's
Action in severing Diplomatic Relations with Germany¹**

WHEREAS the President has, for the reasons stated in his address delivered to the Congress in joint session on February 3, 1917, severed diplomatic relations with the Imperial German Government by the recall of the American Ambassador at Berlin and by handing his passports to the German Ambassador at Washington; and

WHEREAS, notwithstanding this severance of diplomatic intercourse, the President has expressed his desire to avoid conflict with the Imperial German Government; and

WHEREAS the President declared in his said address that if in his judgment occasion should arise for further action in the premises on the part of the Government of the United States he would submit the matter to the Congress and ask the authority of the Congress to use such means as he might deem necessary for the protection of American seamen and people in the prosecution of their peaceful and legitimate errands on the high seas: Therefore be it

Resolved, That the Senate approves the action taken by the President as set forth in his address delivered before the joint session of the Congress, as above stated.

¹*Congressional Record*, February 7, 1917, p. 3046.

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Carnegie Endowment for International Peace

DIVISION OF INTERNATIONAL LAW

Pamphlet No. 24



DOCUMENTS RELATING TO THE CONTRO- VERSY OVER NEUTRAL RIGHTS BETWEEN THE UNITED STATES AND FRANCE, 1797-1800

PUBLISHED BY THE ENDOWMENT
WASHINGTON, D. C.

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Prefatory Note

In President Wilson's address before the Congress on February 26, 1917, he said that

we must defend our commerce and the lives of our people in the midst of the present trying circumstances, with discretion but with clear and steadfast purpose. Only the method and the extent remain to be chosen upon the occasion, if occasion should indeed arise. Since it has unhappily proved impossible to safeguard our neutral rights by diplomatic means against the unwarranted infringements they are suffering at the hands of Germany, there may be no recourse but to *armed* neutrality, which we shall know how to maintain and for which there is abundant American precedent.

In view of the statements contained in the President's address setting forth the difficulties of the Government of the United States concerning its maritime commerce, it has been thought both interesting and timely to collect and to publish the accompanying documents relating to the maritime controversy with France during the presidency of John Adams. The present pamphlet, the first of a series, contains pertinent extracts from President Adams' messages, the respective replies of the Senate and the House, the laws enacted by Congress to meet the situation, and the proclamations issued by the President. By way of introduction, there is prefixed an extract from the learned note of J. C. Bancroft Davis' *Treaties and Conventions between the United States and other Powers (1776-1887)*, which gives in summary form the history of the controversy, and there is appended the convention of September 30, 1800, between the United States and France, negotiated during this controversy and which brought it to an end.

JAMES BROWN SCOTT,
Director of the Division of International Law.

Washington, D. C., February 28, 1917.

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NOTE.—Many of the above citations are not those in general use, but as they are reproductions from older publications, it has not been deemed wise to change them to conform to modern practice.

DOCUMENTS RELATING TO THE CONTROVERSY OVER NEUTRAL
RIGHTS BETWEEN THE UNITED STATES AND FRANCE, 1797-1800.

Extract from Notes to Treaties and Conventions, 1889, relating to
the United States and France¹

On the 25th of January, 1782, the Continental Congress passed an act authorizing and directing Dr. Franklin to conclude a Consular Convention with France on the basis of a scheme which was submitted to that body. Dr. Franklin concluded a very different convention, which Jay, the Secretary for Foreign Affairs, and Congress did not approve.² Franklin having returned to America, the negotiations then fell upon Jefferson, who concluded the Convention of 1788. This was laid before the Senate by President Washington on the 11th of June, 1789.

On the 21st of July it was ordered that the Secretary of Foreign Affairs attend the Senate to-morrow and bring with him such papers as are requisite to give full information relative to the Consular Convention between France and the United States.³ Jay was the Secretary thus "ordered." He was holding over, as the new Department was not then created. The Bill to establish a Department of Foreign Affairs had received the assent of both Houses the previous day,⁴ but had not yet been approved by the President.⁵ Jay appeared, as directed, and made the necessary explanations.⁶ The Senate then Resolved that the Secretary of Foreign Affairs under the former Congress be requested to peruse the said Convention, and to give his opinion how far he conceives the faith of the United States to be engaged, either by former

¹Treaties and Conventions, 1889.

²1 D. C., 1783-89, 232.

³Annals 1st Sess. 1st Cong., 52.

⁴Ib., 685.

⁵Ib., 52.

⁶Ib.,

NOTE.—The footnotes in this section are reproduced exactly as they appear in the original document excepting necessary changes in exponents.

agreed stipulations or negotiations entered into by our Minister at the Court of Versailles, to ratify in its present sense or form the Convention now referred to the Senate.¹ Jay made a written report on the 27th of July that in his judgment the United States ought to ratify the Convention;² and the Senate gave its unanimous consent.³ The Statute to carry the Convention into effect was passed the 14th of April, 1792.⁴

Three articles in the treaties with France concluded before the Constitution became the cause of difference between the two Powers:

1. Article XI of the Treaty of Alliance, by which the United States, for a reciprocal consideration, agreed to guarantee to the King of France his possessions in America, as well present as those which might be acquired by the Treaty of Peace.

2. Article XVII of the Treaty of Amity and Commerce, providing that each party might take into the ports of the other its prizes in time of war, and that they should be permitted to depart without molestation; and that neither should give shelter or refuge to vessels which had made prizes of the other unless forced in by stress of weather, in which case they should be required to depart as soon as possible.

3. Article XXII of the same Treaty, that foreign privateers, the enemies of one party, should not be allowed in the ports of the other to fit their ships or to exchange or sell their captures, or to purchase provisions except in sufficient quantities to take them to the next port of their own State.

Jefferson, who was the Minister of the United States at the Court of Versailles when the Constitution went into operation, was appointed Secretary of State by President Washington on the 26th of September, 1789. He accepted the appointment and presented Short to Neckar as chargé d'affaires of the United States.⁵

Gouverneur Morris, of New York, who had been in Europe from the dawn of the French revolution, and had been in regular friendly correspondence with Washington,⁶ was appointed Minister to France on the 12th of January, 1792. At the time of the appointment Wash-

¹Annals 1st Sess. 1st Cong., 52.

²Ib., 54.

³Ib.

⁴1 St. at L., 254.

⁵3 Jefferson's Works, 119.

⁶1 F. R. F., 379-399.

ington wrote him a friendly and admonitory letter: "The official communications from the Secretary of State accompanying this letter will convey to you the evidence of my nomination and appointment of you to be Minister Plenipotentiary of the United States at the Court of France; and my assurance that both were made with *all my heart* will, I am persuaded, satisfy you as to that fact. I wish I could add that the advice and consent flowed from a similar source. * * * Not to go further into detail I will place the ideas of your political adversaries in the light in which their arguments have presented them to me, namely, that the promptitude with which your lively and brilliant imagination is displayed allows too little time for deliberation and correction, and is the primary cause of those sallies which too often offend, and of that ridicule of character which begets enmity not easy to be forgotten, but which might easily be avoided if it was under the control of more caution and prudence. In a word, that it is indispensably necessary that more circumspection should be observed by our representatives abroad than they conceive you are inclined to adopt. In this statement you have the *pros* and *cons*. By reciting them I give you a proof of my friendship if I give you none of my policy or judgment."¹

Morris entered upon the duties of his office with these wise cautions in his hand, but he did not succeed in gaining the good-will of a succession of governments with which he had little sympathy:² for he writes Jefferson on the 13th of February, 1793: "Some of the leaders here who are in the diplomatic committee hate me cordially, though it would puzzle them to say why."³

When Morris was appointed Minister, the commercial relations between the two countries were satisfactory to neither. Exceptional favors to the commerce of the United States, granted by royal decree in 1787 and 1788,⁴ had been withdrawn, and a jealousy was expressed in France in consequence of the Act of Congress putting British and French commerce on the same basis in American ports.⁵ No exceptional advantages had come to France from the war of the revolution, and American commerce had reverted to its old British channels.

¹10 Washington's Writings, 216-18.

²1 F. R. F., 412.

³Ib., 350.

⁴Ib., 113, 116.

⁵See Short's correspondence, Ib., 120.

Jefferson greatly desired to conclude a convention with France which should restore the favors which American commerce had lost, and bring the two countries into closer connection. On the 10th of March, 1792, he instructs Morris: "We had expected, ere this, that in consequence of the recommendation of their predecessors, some overtures would have been made to us on the subject of a Treaty of commerce. * Perhaps they expect that we should declare our readiness to meet on the ground of Treaty. If they do, we have no hesitation to declare it."¹ Again, on the 28th of April, he writes: "It will be impossible to defer longer than the next session of Congress some counter regulations for the protection of our navigation and commerce. I must entreat you, therefore, to avail yourself of every occasion of friendly remonstrance on this subject. If they wish an equal and cordial treaty with us, we are ready to enter into it. We would wish that this could be the scene of negotiation."² Again, on the 16th of June, he writes: "That treaty may be long on the anvil; in the mean time we cannot consent to the late innovations without taking measures to do justice to our own navigation."³

The great revolution of the 10th of August, and the imprisonment of the King, were duly reported by Morris;⁴ and Jefferson replied on the 7th of November: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation substantially declared. * * There are some matters which I conceive might be transacted with a government *de facto*; such, for instance, as the reforming the unfriendly restrictions on our commerce and navigation."⁵

To these instructions, Morris answered on the 13th of February, 1793, three weeks after the execution of the King, and a fortnight after the declaration of war against England: "You had * instructed me to endeavor to transfer the negotiation for a new treaty to America, and if the revolution of the 10th of August had not taken place, * I should, perhaps, have obtained what you wished. *' * * The thing you wished for is done, and you can treat in America if

¹ Jefferson's Works, 338-9.

²Ib., 356.

³Ib., 449.

⁴1 F. R. F., 333.

⁵3 Jefferson's Works, 489.

you please.”¹ In the same dispatch, Morris spoke of the “sending out of M. Genet, without mentioning to me a syllable either of his mission or his errand,” and said that “the pompousness of this embassy could not but excite the attention of England.”²

On the 7th of March, Morris wrote to Jefferson that “Genet took out with him three hundred blank commissions, which he is to distribute to such as will fit out cruisers in our ports to prey on the British commerce,” and that he had already mentioned the fact to Pinckney, and had desired him to transmit it.³

The new condition of affairs caused by the war induced the President to submit a series of questions to the members of his cabinet for their consideration and reply.⁴ It would seem from a passage in Mr. Jefferson’s *Ana* that the second of these questions—“Shall a Minister from France be received?” was suggested by the Secretary of State.⁵ An account of the meeting of the cabinet at which these questions were discussed will be found in vol. 9 Jefferson’s Works, page 142.

The first two questions were unanimously answered in the affirmative—that a proclamation for the purpose of preventing citizens of the United States from interfering in the war between France and Great Britain should issue, and that Genet should be received; but by a compromise, the term “neutrality” was omitted from the text of the proclamation.⁶

When Genet landed in Charleston, on the 8th of April, 1793—even when he arrived in Philadelphia—it may be believed that Washington contemplated the probability of closer relations with France, and the possibility of a war with Great Britain. The relations with the latter Power were in a critical condition. British garrisons were occupying commanding positions on our lake frontiers, within the territory of the United States, in violation of the Treaty of 1783; and an Indian quarrel was on the President’s hands, fomented, as he thought, by British intrigue.⁷

The policy which Washington favored, denied France nothing that she could justly demand under the Treaty, except the possible enforce-

¹ F. R. F., 350.

² *Ib.*

³ F. R. F., 354.

⁴ 10 Washington’s Works, 337, 533.

⁵ 9 Jefferson’s Works, 140.

⁶ 3 Jefferson’s Works, 591.

⁷ 10 Washington’s Works, 239. See also Morris’s opinion, 1 F. R. F., 412, and Randolph’s, *Ib.*, 678.

ment of the provision of guarantee; and that provision was waived by Genet in his first interview with Jefferson. "We know," he said, "that under present circumstances we have a right to call upon you for the guarantee of our islands. But we do not desire it."¹

On the other hand, it offered to Great Britain neutrality only, without a right of asylum for prizes, this being conferred exclusively by Treaty upon France; and it demanded the relinquishment of the Forts on the lakes and the abandonment of impressment.

It is not likely that the purposes of Genet's mission were fully comprehended by the American Government. By a Treaty in 1762 (first made public in 1836),² France ceded Louisiana to Spain. Genet was instructed to sound the disposition of the inhabitants of Louisiana towards the French Republic, and to omit no opportunity to profit by it should circumstances seem favorable. He was also to direct particular attention to the designs of the Americans upon the Mississippi.³

In one of his letters Genet says of himself, "I have been seven years a head of the bureau at Versailles, under the direction of Vergennes; I have passed one year at London, two at Vienna, one at Berlin, and five in Russia."⁴ His dealings with the United States showed that he had gathered little wisdom from such varied experience.

Before he left Charleston, which at that time had few regular means of communication with Philadelphia, he had armed and commissioned several vessels, and these vessels, dispatched to sea, had made many prizes.⁵ On his arrival at Philadelphia, Jefferson met him with complaints; but he justified his course at Charleston and denounced an interference with it as a "State Inquisition";⁶ and, admitting what was complained of, he contended that he had not exceeded the rights conferred upon his country by the Treaty of 1778.

The Secretary of State disputed his reasoning; upon which he retorted: "I wish, Sir, that the Federal Government should observe, as far as in their power, the public engagements contracted by both nations; and that by this generous and prudent conduct, they will give at least to the world the example of a true neutrality, which does not consist in the cowardly abandonment of their friends, in the moment

¹³ Jefferson's Works, 563.

²⁶ Garden, *Traité de Paix*, 266.

³⁸ Garden, *Traité de Paix*, 40-41.

⁴¹ F. R. F., 183.

⁵Ib., 150.

⁶Ib.

when danger menaces them, but in adhering strictly, if they can do no better, to the obligations they have contracted with them."¹ He continued to claim and exercise the right of using the ports of the United States as a base for warlike operations, and, as the discussions went on, his expressions became stronger, and more contemptuous toward the President and the Government of the United States.

His instructions contemplated a political alliance between the two republics.² This was never proposed. He did propose, however, the re-arrangement of the debt due to France on the basis of the payment of a larger installment than was required by the contract, to be expended in the purchase of provisions in the United States:—and the conclusion of a new commercial Treaty. Jefferson declined the former, and as to the latter said that the participation in matters of Treaty given by the Constitution to the Senate would delay any definite answer.³

At length his conduct became so violent and indecent (Garden speaks of Washington as "personnellement insulté dans les actes diplomatiques de M. Genet")⁴ that Jefferson, on the 15th of August, 1793, instructed Morris to demand his recall. One of the first acts of his successor was to demand his arrest for punishment, which was refused by the Government of the United States "upon reasons of law and magnanimity."⁵

It was several months before the request for his recall could be complied with. Meanwhile, the United States being without a navy, prizes continued to be brought into their ports, and French Consuls attempted to hold prize courts within their jurisdiction.⁶ Genet also applied himself diligently at this time to the greater scheme respecting the Louisianas, which Garden regards as the main object of his mission. An armed expedition was organized in South Carolina and Georgia for an attack upon Florida.⁷ Garden says that he had assurances that all Louisiana desired to return under the jurisdiction of France, and he made serious preparations for conquering it. He prepared a co-operation of naval forces, which were to appear off the coast of Florida.

¹ F. R. F., 151.

²Ib., 708.

³Ib., 568.

⁴8 Garden, *Traité de Paix*, 43, "personally insulted by the acts of Mr. Genet."

⁵1 F. R. F., 709.

⁶Ib., 147.

⁷Ib., 309, 426.

The principal land forces were to embark from Kentucky, and, descending the Ohio and the Mississippi, were to fall unexpectedly upon New Orleans."¹ The action of the Government and the recall of Genet put a stop to these expeditions against Spain, although Jefferson at that time thought a war with Spain inevitable.²

In retaliation the Executive Provisory Council of the French Republic demanded the recall of Morris.³ In communicating the fact to him Secretary Randolph said: "You have been assailed, however, from another quarter. Nothing has ever been said to any officer of our Government by the Ministers of France which required attention until the 9th day of April last, when Mr. Fauchet communicated to me a part of his instructions, indirectly but plainly making a wish for your recall. In a few days afterwards a letter was received from the Executive Provisory Council, expressive of the same wish. Mr. Fauchet was answered by me, under the direction of the President, as I am sure your good sense will think inevitable, that the act of reciprocity demanded should be performed."⁴

Washington wrote Morris, when his successor went out: "I have so far departed from my determination as to be seated in order to assure you that my confidence in, and friendship and regard for you, remain undiminished * * and it will be nothing new to assure you that I am always and very sincerely, yours, affectionately;"⁵ and when his correspondence was called for by the Senate, Washington himself, in association with Hamilton and Randolph, went over it (and it was voluminous) in order that nothing might be communicated which would put in peril those who had given him information, or which would re-act upon him in France.⁶

When the war broke out in February, 1793, Morris wrote Jefferson: "As to the conduct of the war, I believe it to be on the part of the enemy as follows: first, the maritime powers will try to cut off all supplies of provisions, and take France by famine; that is to say, excite revolt among the people by that strong lever. * * It is not improbable that our vessels bringing provisions to France may be cap-

¹8 Garden, *Traité de Paix*, 42. More detailed account of this affair will be found in 2 Pitkin's *Political History*, 379.

²3Jefferson's *Works*, 591.

³1 F. R. F., 463.

⁴Randolph to Morris, April 29, 1794, MS. Dept. of State.

⁵1 F. R. F., 409.

⁶Randolph to Morris, April 29, 1794, MS. Dept. of State.

tured and taken into England.”¹ His prescience was accurate. Such instructions were given to British men-of-war on the 8th day of June, 1793. The British measure, however, was anticipated by a decree of the National Convention of the 9th of May, authorizing ships of war and privateers to seize and carry into the ports of the Republic merchant-vessels which are wholly or in part loaded with provisions, being neutral property bound to an enemy’s port, or having on board merchandise belonging to an enemy.² On the 23d of the same month the vessels of the United States were exempted from the operation of this decree;³ but on the 5th of December, 1793, President Washington sent a special message to Congress, in which he said: “The representative and executive bodies of France have manifested generally a friendly attachment to this country; have given advantages to our commerce and navigation, and have made overtures for placing these advantages on permanent ground; a decree, however, of the National Assembly, subjecting vessels laden with provisions to be carried into their ports, and making enemies’ goods lawful prize in the vessel of a friend, contrary to our Treaty, though revoked at one time as to the United States, has been since extended to their vessels also, and has been recently stated to us.”⁴

An embargo was laid upon vessels in the port of Bordeaux, “some exceptions in favor of those vessels said to be loaded on account of the republic” being made.⁵ Morris was promised daily that the embargo should be taken off, and indemnification be granted for the losses,⁶ but it was not done, and “a number of Americans,” injured by it, complained to the Minister.⁷ The embargo was not removed until the 18th of November, 1794.⁸

Monroe succeeded Morris, and on the 12th of February, 1795, wrote: “Upon my arrival here I found our affairs * * in the worst possible situation. The Treaty between the two Republics was violated. Our commerce was harassed in every quarter and in every article, even that of tobacco not excepted. * * Our former Minister was not only without the confidence of the government, but an object of particular

¹ F. R. F., 350.

²Ib., 244.

³Ib.

⁴Ib., 141.

⁵Ib., 401.

⁶Ib., 403.

⁷Ib., 405.

⁸Ib., 689.

jealousy and distrust. In addition to which it was suspected that we were about to abandon them for a connection with England, and for which purpose *principally* it was believed that Mr. Jay had been sent there."¹

Monroe's and Jay's services commenced nearly simultaneously. Monroe's commission was dated the 28th of May, and Jay's the 19th of April, 1794. Jay's Treaty was proclaimed the 29th of February, 1796. Monroe was not recalled until the 22d of the following August,² but the angry correspondence which preceded his recall³ may be said to have been caused by a radical difference of opinion respecting his colleague's mission to London.

Whatever may have been the feeling toward Monroe's predecessor, he himself was well received. The Committee of Public Safety welcomed him "with the most distinguished marks of affection," and offered him a house, which offer he declined.⁴ He remained in relations of personal good-will with the different Governments of France, and did not fail to urge in his correspondence with the Secretary of State the policy of settling the differences with Great Britain by an alliance with France:⁵ nor did he conceal those opinions from the Government to which he was accredited.⁶ While the relations between Great Britain and the United States were balancing themselves in London on the issue of Jay's Treaty, those between the United States and France were held in like suspense in Paris.

Monroe endeavored to obtain from Jay a knowledge of the negotiations and a copy of the Treaty. Jay refused to communicate information, except in confidence, and Monroe declined to receive it unless he should be at liberty to communicate it to the French Government.⁷ A copy was, however, officially communicated to the French Minister at Washington.⁸ When the fate of that Treaty was ensured, the directory at first resolved (and so informed Monroe) to consider the alliance at an end, but they gave no formal notice to that effect.⁹ In

¹1 F. R. F., 694.

²Ib., 741.

³Ib., 658-741.

⁴Ib., 675.

⁵See, among others, his letters in 1 F. R. F. of Nov. 20, 1794, 685; Dec. 2, 1794, 687; Jan. 13, 1795, 691; Feb. 12, 1795, 694; and March 17, 1795, 700.

⁶Ib., 700.

⁷Ib., 517, 691, 700.

⁸Ib., 594.

⁹Ib., 730.

lieu of that they lodged with him, on the 11th of March, 1796, a summary exposition of the complaints of the French Government against the Government of the United States, namely, (1.) That the United States Courts took jurisdiction over French Prizes, in violation of the Treaty of 1778. (2.) That British men-of-war were admitted into American ports in violation of the same article. (3.) That the United States had failed to empower any one to enforce consular judgments, which was alleged to be a violation of the Convention of 1788. (4.) That the Captain of the "Cassius" had been arrested in Philadelphia for an offense committed on the high seas. (5.) That an outrage had been committed on the effects of the French Minister within the waters of the United States. (6.) That by Jay's Treaty the number of articles contraband of war, which a neutral might not carry, had been increased above the list specified in the treaties with France, which was a favor to England. (7.) That provisions had been recognized in Jay's Treaty as an article contraband of war.¹

On the 2d of July, 1796, the directory decreed that all neutral or allied powers should, without delay, be notified that the flag of the French Republic would treat neutral vessels, either as to confiscation, or to searches, or capture, in the same manner as they shall suffer the English to treat them.² Garden says that a second decree relating to the same object was made on the 16th of the same month, and that neither decree has been printed. The translation of the first one is printed among the American documents cited above, as also the translation of a note transmitting it to Monroe.³ Garden refers to Rondonneau, *Répertoire général de la Législation française*, Vol. II, p. 311, for the text of the second.⁴

Pickering, the successor of Randolph, noticed the complaints of the French Government in elaborate instructions to Pinckney, Monroe's successor, on the 16th of January, 1797.⁵ His replies were in substance, (1.) That the courts had taken jurisdiction over no prizes, except when they were alleged to have been made in violation of the obligations of the United States as a neutral, and that the cases in which interference had taken place were few in number and insignifi-

¹ F. R. F., 732-3.

²Ib., 577.

³Ib., 739.

⁴6 Garden, *Traité de Paix*, 112, note.

⁵1 F. R. F., 559.

cant. (2.) That it was no violation of the Treaty with France to admit British ships of war into American ports, provided British privateers and prizes were excluded. (3.) That there was no Treaty obligation upon officers of the United States to enforce French consular judgments, and that the clause referred to was exceptional and ought not to be enlarged by construction. (4.) The facts respecting the "Cassius" were stated in order to show that no offense had been committed. (5.) That the executive had taken as efficacious measures as it could to obtain satisfaction for the outrage upon Fauchet. (6.) That the United States would gladly have put the definition of contraband on the same basis in its Treaties with both countries; but that Great Britain would not consent, and an independent arrangement had been made which did not affect the other Treaty arrangement made with France. (7.) That the stipulation as to provisions, without admitting the principle that provisions were contraband, would tend to promote adventures in that article to France.

A correspondence respecting the same subject had also taken place at Washington, in which the same complaints of the directory were repeated and other complaints were urged.¹ To the latter Pickering responded thus, in the same note in which he noticed the complaints which had been made in Paris: (1.) *Charge*.—That the negotiation at London had been "enveloped from its origin in the shadow of mystery, and covered with the veil of dissimulation."² *Reply*.—"To whom was our Government bound to unveil it? To France or to her Minister? * Did we stipulate to submit the exercise of our sovereignty * to the direction of the Government of France? Let the Treaty itself furnish an answer."³ (2.) *Charge*.—That the Government of the United States had made an insidious proclamation of neutrality. *Reply*.—That "this proclamation received the pointed approbation of Congress," and "of the great body of the citizens of the United States." (3.) *Charge*.—That the United States "suffered England, by insulting its neutrality, to interrupt its commerce with France." *Reply*.—That a satisfaction had been demanded and obtained in a peaceable manner—by Treaty, and not by war. (4.) *Charge*.—That they "allowed the French colonies to be declared in a state of blockade." *Reply*.—That the United States, as a neutral, could only ques-

¹ F. R. F., 579.

²Ib., 581.

³Ib., 561.

tion the sufficiency of a blockade, and that they would do so when facts should warrant it. (5.) *Charge*.—That the United States eluded advances for renewing the Treaties of commerce. *Reply*.—That Genet was the first French Minister who had been empowered to treat on those subjects, and the reasons for not treating with him were well known; that his successor, Fauchet, had not been so empowered, and that the United States had always been ready to negotiate with Adet, and all obstacles had come from him since the ratification of Jay's Treaty. (6.) *Charge*.—That the United States were guilty of ingratitude towards France. *Reply*.—That the United States, appreciating their obligations to France, had done something themselves towards the achievement of their independence; that, "of all the loans received from France in the American war, amounting nearly to 53,000,000 livres, the United States under their late Government had been enabled to pay but 2,500,000 livres; that the present Government, after paying up the arrearages and installments mentioned by Mr. Jefferson, had been continually anticipating the subsequent installments until, in the year 1795, the whole of our debt to France was discharged by the payment of 11,500,000 livres, no part of which would have become due until September 2, 1796, and then only 1,500,000, the residue at subsequent periods, the last not until 1802." (7.) *Charge*.—That English vessels were impressing American seamen. *Reply*.—That this concerned the Government of the United States only; and that as an independent nation they are not obliged to account to any other power respecting the measures which they judge proper to take in order to protect their own citizens. Other less important points were discussed, as will be seen by referring to the correspondence.

The course of the French was giving rise to many claims—for spoliations and maltreatment of vessels at sea, for losses by the embargo at Bordeaux, for the non-payment of drafts drawn by the colonial administrations, for the seizure of cargoes of vessels, for non-performance of contracts by government agents, for condemnation of vessels and their cargoes in violation of the provisions of the Treaties of 1778, and for captures under the decree of May 9, 1793. Skipwith, the Consul-General of the United States in France, was directed to examine into and report upon these claims; his report was made on the 20th November, 1795.¹

¹ F. R. F., 753-758.

On the 9th of September, 1796, Charles Cotesworth Pinckney was sent out to replace Monroe, with a letter from the Secretary of State, saying: "The claims of the American merchants on the French Republic are of great extent, and they are waiting the issue of them, through the public agents, with much impatience. Mr. Pinckney is particularly charged to look into this business, in which the serious interests, and, in some cases, nearly the whole fortunes of our citizens are involved."¹ But the directory, early in October, 1793, recalled their Minister from the United States.² Before Pinckney could arrive in France, they, "in order to strike a mortal blow, at the same moment, to British industry and the profitable trade of Americans in France, promulgated the famous law of the 10th Brumaire, year 5 (31st October, 1796), whereby the importation of manufactured articles, whether of English make or of English commerce, was prohibited both by land and sea throughout the French Republic";³ and, on his arrival, they informed Monroe that the directory would no longer recognize or receive a Minister Plenipotentiary from the United States, until after a reparation of the grievances demanded of the American Government, and which the French Republic has a right to expect."⁴

Pinckney was thereupon ordered to quit France under circumstances of great indignity,⁵ and Monroe took his formal leave on the 30th December, 1796. In reply to his speech at that time, the president of the directory said: "By presenting, this day, to the Executive Directory your letters of recall, you offer a very strange spectacle to Europe. France, rich in her freedom, surrounded by the train of her victories, and strong in the esteem of her allies, will not stoop to calculate the consequences of the condescension of the American Government to the wishes of its ancient tyrants. The French Republic expects, however, that the successors of Columbus, Raleigh, and Penn, always proud of their liberty, will never forget that they owe it to France. They will weigh, in their wisdom, the magnanimous friendship of the French people with the crafty caresses of perfidious men, who meditate to bring them again under their former yoke. Assure the good people of America, Mr. Minister, that, like them, we adore

¹ F. R. F., 742.

²Ib., 745.

³6 Garden, *Traité de Paix*, 117.

⁴1 F. R. F., 746.

⁵2 Ib., 710.

liberty; that they will always possess our esteem, and find in the French people that republican generosity which knows how to grant peace as well as to cause its sovereignty to be respected."¹

The moment this speech was concluded, the directory, accompanied by the Diplomatic Corps, passed into the audience-hall to receive from an Aide-de-Camp of Bonaparte the four Austrian colors taken at the battle of Arcola.² The Diplomatic Corps may, therefore, be presumed to have witnessed this indignity.

A French writer of authority thus characterizes these incidents: "Ainsi ce gouvernement prétendait que les États-unis accédassent à ses demandes sans examen, sans discussion préalable; à cet outrage, le gouvernement français en ajouta un autre: lorsque M. Monroe prit publiquement congé du directoire exécutif, Barras, qui en était le président, lui adressa un discours rempli d'expressions qui durent choquer les Américains."³

In closing the sketch of what took place during the administration of President Washington, it only remains to say that in addition to the acts of the 2d of July and the 31st of October, 1796, already referred to, the Executive Directory, on the 2d of March, 1797, decreed that all neutral ships with enemy's property on board might be captured; that enemy's property in neutral bottoms might be confiscated; that the Treaty of 1778 with the United States should be modified by the operation of the favored nation clause, so as to conform to Jay's Treaty, in the following respects: (1) That property in American bottoms not proved to be neutral should be confiscated; (2) That the list of contraband of war should be made to conform to Jay's Treaty; (3) That Americans taking a commission against France should be treated as pirates: and that every American ship should be good prize which should not have on board a crew-list in the form prescribed by the model annexed to the Treaty of 1778, the observance of which was required by the 25th and 27th Articles.⁴ The 25th Article made provision for a passport, and for a certificate of cargo. The 27th

¹ F. R. F., 747.

² *Rédacteur*, No. 382, Jan. 1, 1797.

³ 6 Garden, *Traité de Paix*, 118. "Thus this government pretended that the United States should accede to its demands without examination, without discussion. To this outrage the French Government added another: While Mr. Monroe took public leave of the Executive Directory, Barras, who was the president, made him a speech full of expressions calculated to shock the Americans."

⁴ F. R. F., 31.

Article took notice only of the passport; and the model of the passport only was annexed to the Treaty. The Treaty required that the passport should express the name, property, and bulk of the ship, and the name and place of habitation of the master, but it made no provision respecting the crew-list. After the adoption of the Constitution, Congress, by general laws, made provision for national official documents, for proof of, among other things, the facts referred to in the 25th and 27th Articles of the Treaty with France. The name of the ship was to be painted on her stern, and to be shown in the Register;¹ her ownership was to be proved on oath, and be stated in the Register,² and her tonnage was to be stated in the same instrument, as the result of our official survey.³ Equally cogent laws were made to ensure an accurate crew-list.⁴ It is probable, therefore, that when the decree of March 2, 1797, was made, there was not an American ship afloat with the required document; and it is equally probable that the French Government, which, with the whole civilized world, had acquiesced in the sufficiency of the new national system, knew that to be the fact. The decree was, therefore, equivalent in its operation to a declaration of maritime war against American commerce. The United States had at that time no navy against which such a war could be carried on.

The difficulties in dealing with these questions were increased by the attitude of other foreign powers. The Batavian Republic besought the United States Minister to represent to his Government "how useful it would be to the interests of the inhabitants of the two republics, that the United States should at last seriously take to heart the numberless insults daily committed on their flag by the English";⁵ and the Spanish Minister at Philadelphia formally remonstrated against the British Treaty of 1794 as a violation of a Treaty with Spain concluded a year later, because it did not make the neutral flag secure the goods; because it extended the list of contraband; and because it assumed that Great Britain had the right of navigation of the Mississippi.⁶

President Adams, in his speech at the opening of the first session of the Fifth Congress (May 16, 1797), said: "With this conduct of

¹1 St. at L., 288.

²Ib., 289.

³Ib., 290; see also Ib., 55, *et seq.*

⁴Ib., 31.

⁵2 F. R. F., 13.

⁶Ib., 14.

the French Government it will be proper to take into view the public audience given to the late minister of the United States, on his taking leave of the Executive Directory. The speech of the President discloses sentiments more alarming than the refusal of a minister, because more dangerous to our independence and union, and at the same time studiously marked with indignities towards the Government of the United States. It evinces a disposition to separate the people of the United States from the Government; to persuade them that they have different affections, principles, and interests from those of their fellow-citizens whom they themselves have chosen to manage their common concerns; and thus, to produce divisions fatal to our peace. Such attempts ought to be repelled with a decision which shall convince France and the world that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest. * * *

"The diplomatic intercourse between the United States and France being at present suspended, the Government has no means of obtaining official information from that country; nevertheless there is reason to believe that the Executive Directory passed a decree on the 2d of March last, contravening, in part, the treaty of amity and commerce of 1778, injurious to our lawful commerce, and endangering the lives of our citizens. A copy of this treaty will be laid before you.

"While we are endeavoring to adjust all of our differences with France, by amicable negotiation, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and general complexion of affairs, render it my indispensable duty to recommend to your consideration effectual measures of defence.¹

"It is impossible to conceal from ourselves, or the world, what has been before observed, that endeavors have been employed to foster and establish a division between the government and people of the United States. To investigate the causes which have encouraged this attempt is not necessary. But to repel, by decided and united counsels, insinuations so derogatory to the honor, and aggression so dangerous to the Constitution, union, and even independence of the nation, is an indispensable duty."²

The answer of the House to this speech was in a conciliatory spirit;

¹Annals 5th Cong., 55.

²Ib., 59.

and on the first of the following June Congress yielded so far as to pass a law providing for passports for ships and vessels of the United States.¹

Congress adjourned on the 10th of July. On the 13th President Adams commissioned Charles Cotesworth Pinckney, John Marshall, and Elbridge Gerry as Envoys to proceed to France and endeavor to renew the relations which had been so rudely broken by the Directory. Their instructions will be found in the 2d volume of the *Folio Foreign Relations*, pages 153, *et seq.* Among other matters they were to secure an adjustment of the claims for spoliation of citizens of the United States, by this time amounting to many millions of dollars.

They arrived in Paris on the evening of the 4th of October, 1797,² and at once notified the Foreign Minister of their presence and requested an interview. Instead of receiving them, three gentlemen, who have become known in history as X, Y, and Z, waited upon them at various times, sometimes singly and sometimes together, and claimed to speak for Talleyrand and the Directory. They told the Envoys that they must pay money, "a great deal of money";³ and when they were asked how much, they replied "fifty thousand pounds sterling"⁴ as a *douceur* to the Directory, and a loan to France of thirty-two millions of Dutch florins. They said that the passages in the President's speech, which are quoted above, had offended the Directory, and must be retracted, and they urged upon the commissioners in repeated interviews the necessity of opening the negotiations by proposals to that effect.⁵

The American commissioners listened to their statements, and after consultation determined that they "should hold no more indirect intercourse with the Government."⁶ They addressed a letter to Talleyrand on the 11th of November, informing him that they were ready to negotiate.⁷ They got no answer; but on the 14th of December, X appeared again,⁸ on the 17th Y appeared,⁹ and on the 20th "a lady, who is well

¹ St. at L., 489.

² F. R. F., 157.

³ *Ib.*, 159.

⁴ *Ib.*

⁵ *Ib.*, 158-168.

⁶ *Ib.*, 164.

⁷ *Ib.*, 166.

⁸ *Ib.*

⁹ *Ib.*, 177.

acquainted with M. Talleyrand," talked to Pinckney on the subject;¹ still they got no answer from Talleyrand, and on the 18th of January they read the announcement of a decree that every vessel found at sea loaded with merchandise the production of England should be good prize.² Though unrecognized, they addressed an elaborate letter on the 27th of January, 1798, to Talleyrand, setting forth in detail and with great ability the grievances of the United States.³ On the 2d of March, they had an interview with him. He repeated that the Directory had taken offense at Mr. Adams's speech, and added that they had been wounded by the last speech of President Washington. He complained that the Envoys had not been to see him personally; and he urged that they should propose a loan to France.⁴ Pinckney said that the propositions seemed to be those made by X and Y. The Envoys then said that they had no power to agree to make such a loan. On the 18th of March, Talleyrand transmitted his reply to their note. He dwelt upon Jay's Treaty as the principal grievance of France. He says "he will content himself with observing, summarily, that in this Treaty everything having been calculated to turn the neutrality of the United States to the disadvantage of the French Republic, and to the advantage of England; that the Federal Government having in this act made to Great Britain concessions the most unheard of, the most incompatible with the interests of the United States, the most derogatory to the alliance which subsisted between the said States and the French Republic, the latter was perfectly free, in order to avoid the inconveniences of the Treaty of London, to avail itself of the preservative means with which the law of nature, the laws of nations, and prior treaties furnish it." He closed by stating "that notwithstanding the kind of prejudice which has been entertained with respect to them, the Executive Directory is disposed to treat with that one of the three whose opinions, presumed to be more impartial, promise, in the course of the explanation, more of that reciprocal confidence which is indispensable."⁵

Gerry was the member referred to. The three Envoys answered

¹² F. R. F., 167.

²¹ F. R. F., 182.

³Ib., 169.

⁴Ib., 186.

⁵Ib., 190-191.

that no one of the three was authorized to take the negotiation upon himself.¹ Pinckney and Marshall then left Paris. Gerry remained. Talleyrand tried to induce him to enter into negotiations for a loan to France, but he refused.² Before he left Paris, a mail arrived from America bringing printed copies of the despatches of the Envoys, with accounts of their interviews with X, Y, and Z and "the lady." Talleyrand at once asked Gerry for the four names.³ Gerry gave him the name of Y, Mr. Bellamy, and Z, Mr. Hautval, and said that he could not give the lady's name, and would not give X's name. The name of X is preserved in the Department of State. Gerry left Paris on the 26th July, 1798.

The President transmitted to Congress the reports of the Envoys as fast as they were received; and when he heard of Marshall's arrival in America he said to Congress, "I will never send another Minister to France without assurances that he will be received, respected, and honored as the representative of a great, free, powerful, and independent nation."⁴ The statutes of the United States show the impression which the news made upon Congress. The "Act to provide an additional armament for the further protection of the trade of the United States, and for other purposes,"⁵ is the first of a series of acts. It was passed in the House amid great excitement. Edward Livingston, who closed the debate on the part of the opposition, said: "Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case."⁶ This was followed in the course of a few weeks by acts for organizing a Navy Department;⁷ for increasing or regulating the Army;⁸ for purchasing arms;⁹ for construction of vessels;¹⁰ for authorizing the cap-

¹1 F. R. F., 199.

²Ib., 204-238.

³Ib., 210.

⁴Ib., 199.

⁵1 St. at L., 552.

⁶2 Annals 5th Cong., 1519.

⁷1 St. at L., 553.

⁸Ib., 552, 558, 604.

⁹Ib., 555, 576.

¹⁰Ib., 556, 569, 608.

ture of French vessels;¹ for suspending all intercourse with France;² for authorizing merchant-vessels to protect themselves;³ for abrogating the Treaties with France;⁴ for establishing a Marine Corps;⁵ and for authorizing the borrowing of money.⁶ In the next session of Congress further augmentation of the Navy⁷ and of the Army⁸ was made; the suspension of intercourse was prolonged,⁹ and provisions were made for restoring captured French citizens,¹⁰ and for retaliations in case of death from impressments.¹¹

Washington was made Lieutenant-General and Commander-in-Chief of the Army, and, in accepting, said: "The conduct of the Directory of France towards our country; their insidious hostility to its Government; their various practices to withdraw the affections of the people from it; the evident tendency of their acts and those of their agents to countenance and invigorate opposition; their disregard of solemn treaties and the law of nations; their war upon our defenceless commerce; their treatment of our Ministers of peace; and their demands, amounting to tribute, could not fail to excite in me corresponding sentiments with those my countrymen have so generally expressed in affectionate addresses to you."¹²

The Attorney-General gave an opinion that a maritime war existed between France and the United States, authorized by both nations,¹³ but Congress never made the constitutional declaration of war, nor was such a declaration made on the other side.

It was on the 21st of June that President Adams informed Congress of the terms on which alone he would be willing to send a new Minister to France. Talleyrand immediately opened indirect means of communication with the American Cabinet through Murray, the American Minister at The Hague,¹⁴ and on the 28th of September he sent word

¹ St. at L., 561, 578.

²Ib., 565.

³Ib., 572.

⁴Ib., 578.

⁵Ib., 594.

⁶Ib., 607.

⁷Ib., 621.

⁸Ib., 725.

⁹Ib., 613.

¹⁰Ib., 624.

¹¹Ib., 743.

¹²Annals 5th Cong., 622.

¹³1 Op. At.-Gen., 84, Lee.

¹⁴2 F. R. F., 241.

through Pichon, the French Secretary of Legation at the same place, that "whatever plenipotentiary the Government of the United States might send to France in order to terminate the existing differences between the two countries, he would be undoubtedly received with the respect due to the representative of a free, independent and powerful nation.¹ To this proffer, embodying the language of the President's message to Congress, the President replied by empowering Chief-Justice Ellsworth, Mr. Davie, and Mr. Murray "to discuss and settle, by a Treaty, all controversies between the United States and France."²

When these Envoys arrived in France they found that the Directory had been overthrown,³ and they had to deal with Bonaparte as first Consul. They succeeded in restoring good relations. An account of their negotiations will be found in the 2d volume of the Folio Edition of the Foreign Relations, pages 307 to 345. Their instructions required them to secure, (1) A claims commission. (2) Abrogation of the old treaties. (3) Abolition of the guarantee of 1778. (4) No agreement for a loan. (5) No engagements inconsistent with prior Treaties, meaning doubtless Jay's Treaty. (6) No renewal of the peculiar jurisdiction conferred on consuls by the convention of 1788. (7) Duration of a Treaty not to exceed twelve years.*

The negotiators exchanged their powers on the 7th of April, 1800,⁵ and concluded a treaty on the 30th of the following September, which (1) declared that the parties could not agree upon the indemnities; (2) nor as to the old treaties; (3) and consequently was silent respecting the guarantee; but (4) made no provisions for a loan; (5) made no engagements inconsistent with prior treaties; (6) did not renew the objectionable consular provisions; and (7) no limitation was set to its operation.

When it was submitted to the Senate that body advised its ratification, provided the second article concerning indemnities should be expunged, and that the convention should be in force for eight years from the date of the exchange of the ratifications. The French Government assented to the limitation of the duration of the Treaty, and to the expunging of the 2d article, upon condition that it should be

¹2 F. R. F., 242.

²Ib., 243.

³Ib., 307.

⁴Ib., 306.

⁵Ib., 313-14.

understood that thereby each party renounced the pretensions which were the objects of the article; which was assented to by the Senate.¹

On the day following the signature of this Treaty in Paris (Sept. 30, 1800), a secret treaty was concluded at St. Ildefonso between France and Spain, which came to be of importance to the United States. This was the Treaty by which Louisiana was restored to France. In consideration of the elevation of the Duke of Parma to the rank of King, and the enlargement of his territory, it was agreed that "Sa Majesté Catholique donnera les ordres nécessaires pour que la France occupe la Louisiane au moment où S. A. R. le duc de Parme sera mise en possession de ses nouveaux Etats."²

The United States were anxious concerning the effect of this upon their future.³ But the failure of the Treaty of Amiens to restore a permanent peace induced Napoleon to determine to transfer all the Louisianas to the United States. He consulted Berthier and Marbois. The conference lasted far into the night. Berthier opposed the cession. Marbois favored it. Early the next morning he called Marbois to him and said, "Je nonce à la Louisiane. Ce n'est point seulement la Nouvelle-Orléans que je veux céder; c'est toute la colonie sans en rien réserver."⁴

The interview took place on the 10th of April;⁵ the decision was made on the morning of the 11th. On the afternoon of the same day the negotiations opened by an abrupt question from Talleyrand to Livingston whether the United States wished for the whole of Louisiana. Livingston, who had been instructed only to negotiate for New Orleans, and the Mississippi as a boundary line,⁶ said, "No, we only want New Orleans and the Floridas."⁷ But he soon found that he was dealing with a much larger question, and Monroe arrived the same day from America with fresh instructions to aid in its disposition. Napoleon empowered Marbois to negotiate for France, and instructed him to consent to the transfer, provided he could secure 50,000,000

¹2 F. R. F., 344.

²8 Garden, *Traité de Paix*, 48; S. Doc. 56, 2d Sess. 23d Cong. "His Catholic Majesty will give the necessary orders so that France may occupy Louisiana the moment when His Royal Highness the Duke of Parma shall be put in possession of his new State."

³2 F. R. F., 552.

⁴8 Garden, *Traité de Paix*, 64. "I renounce Louisiana. It is not New Orleans only that I wish to cede; it is all the colony, reserving nothing."

⁵8 Garden, *Traité de Paix*, 54.

⁶6 F. R. F., 162, No. 460.

⁷2 F. R. F., 552.

francs. He did secure 80,000,000; twenty millions of which were to be applicable to the extinguishment of claims against France, and sixty millions were payable in cash to France. When it was concluded, Napoleon said: "Cette accession de territoire, affermit pour toujours la puissance des Etats-Unis, et je viens de donner à l'Angleterre un rival maritime, qui tôt ou tard abaissera son orgueil."¹

Between the conclusion of the two Treaties of 1800 and 1803 a correspondence arose respecting the construction of the former Treaty.² Robert Livingston, the Minister of the United States, complained that the Council of Prizes (which he regarded "as a political board")³ was proceeding in violation of the provisions of the Treaty. On the 26th of January, 1802, he was "almost hopeless" as to the claims.⁴ His anxiety communicated itself to Madison.⁵ The French Court next proposed to meet the French obligation in paper money,⁶ while the appropriations on the American side were payable in coin.⁷ Livingston thought Bonaparte stood in the way, and that, should anything happen to him, France would "very soon be able to look all demands in the face."⁸ Monroe was sent out to aid in the negotiations, with special powers as to New Orleans and the Floridas.⁹ He arrived just in time to find the First Consul bent on parting with Louisiana and settling with the United States. On the 9th of March, 1803, Talleyrand was already giving signs of yielding. He expressed surprise at the amount of the American claims advanced by Livingston (20,000,000 francs), but avowed his purpose of paying them, whatever they might be, and asked for a specified statement.¹⁰ An explanation, which may account for part of this, may be found in two dates. The peace of Amiens was signed the 25th of March, 1802; the declaration of the renewal of the war was dated the 18th of May, 1803.

¹8 Garden, *Traité de Paix*, 88. "This accession of territory consolidates forever the power of the United States, and I have just given to England a maritime rival who sooner or later will humble her pride."

²6 F. R. F., 154-168.

³Ib., 156.

⁴Ib.

⁵Ib., 158.

⁶Ib., 161.

⁷Ib., 162.

⁸Ib., 163.

⁹Ib., 166.

¹⁰Ib., 167-168.

The Convention of 1800, after providing for the restoration of certain captured property, contained a provision that the debts contracted by one of the two nations with individuals of the other should be paid,¹ but that this clause should not extend to indemnities claimed on account of captures or condemnations. The Convention of 1803 stipulated that these debts, with interest at six per cent., should not exceed twenty millions of francs.

To entitle a claimant to participate in this fund, it was necessary: 1. That he should be a citizen of the United States who had been, and was at the time of the signing of the Treaty, a creditor of France, and who had no established house of commerce in France, England, or other country than the United States, in partnership with foreigners; 2. That, if the claim were for a debt, it should have been contracted for supplies before the 30th of September, 1800, and should have been claimed of the actual Government of France before the 30th of April, 1803; 3. That, if for prizes, it should not be for a prize whose condemnation had been or should be confirmed; 4. That, if for captures, it should not be a case in which the council of prizes had ordered restitution, or in which the claimant could not have had recourse to the government of the French Republic, or where the captors were sufficient; 5. That it should either be for supplies, for embargoes, or for prizes made at sea, in which the appeal had been properly lodged within the time mentioned in the Convention of 1800.

The distribution of this money gave rise to some sharp correspondence.² The claims which were excluded from participation in the distribution have become known as the "French Spoliation Claims." They have been often the subject of Congressional discussion and report.³

¹Art. 5.

²6 F. R. F., 182-207.

³See particularly 5 F. R. F., 314, 352, and 6 F. R. F., 3-207, 558, 1121, and S. R. 10, 2d Sess. 41st Cong., and the various authorities there cited; also, among others, an elaborate debate in the Senate, 11 Debates, 2d Sess. 23d Cong. [H. R., 445, 25th Cong. 2d Sess.].

Extracts from Messages of President Adams, and Replies of the Senate and House

SPECIAL SESSION MESSAGE ¹

UNITED STATES, May 16, 1797.

Gentlemen of the Senate and Gentlemen of the House of Representatives:

The personal inconveniences to the members of the Senate and of the House of Representatives in leaving their families and private affairs at this season of the year are so obvious that I the more regret the extraordinary occasion which has rendered the convention of Congress indispensable.

It would have afforded me the highest satisfaction to have been able to congratulate you on a restoration of peace to the nations of Europe whose animosities have endangered our tranquillity; but we have still abundant cause of gratitude to the Supreme Dispenser of National Blessings for general health and promising seasons, for domestic and social happiness, for the rapid progress and ample acquisitions of industry through extensive territories, for civil, political, and religious liberty. While other states are desolated with foreign war or convulsed with intestine divisions, the United States present the pleasing prospect of a nation governed by mild and equal laws, generally satisfied with the possession of their rights, neither envying the advantages nor fearing the power of other nations, solicitous only for the maintenance of order and justice and the preservation of liberty, increasing daily in their attachment to a system of government in proportion to their experience of its utility, yielding a ready and general obedience to laws flowing from the reason and resting on the only solid foundation—the affections of the people.

It is with extreme regret that I shall be obliged to turn your thoughts to other circumstances, which admonish us that some of these felicities may not be lasting. But if the tide of our prosperity is full and a reflux commencing, a vigilant circumspection becomes us, that we may meet out reverses with fortitude and extricate ourselves from their consequences with all the skill we possess and all the efforts in our power.

In giving to Congress information of the state of the Union and rec-

¹Richardson, Messages, vol. 1, p. 233.

ommending to their consideration such measures as appear to me to be necessary or expedient, according to my constitutional duty, the causes and the objects of the present extraordinary session will be explained.

After the President of the United States received information that the French Government had expressed serious discontents at some proceedings of the Government of these States said to affect the interests of France, he thought it expedient to send to that country a new minister, fully instructed to enter on such amicable discussions and to give such candid explanations as might happily remove the discontents and suspicions of the French Government and vindicate the conduct of the United States. For this purpose he selected from among his fellow-citizens a character whose integrity, talents, experience, and services had placed him in the rank of the most esteemed and respected in the nation. The direct object of his mission was expressed in his letter of credence to the French Republic, being "to maintain that good understanding which from the commencement of the alliance had subsisted between the two nations, and to efface unfavorable impressions, banish suspicions, and restore that cordiality which was at once the evidence and pledge of a friendly union." And his instructions were to the same effect, "faithfully to represent the disposition of the Government and people of the United States (their disposition being one), to remove jealousies and obviate complaints by shewing that they were groundless, to restore that mutual confidence which had been so unfortunately and injuriously impaired, and to explain the relative interests of both countries and the real sentiments of his own."

A minister thus specially commissioned it was expected would have proved the instrument of restoring mutual confidence between the two Republics. The first step of the French Government corresponded with that expectation. A few days before his arrival at Paris the French minister of foreign relations informed the American minister then resident at Paris of the formalities to be observed by himself in taking leave, and by his successor preparatory to his reception. These formalities they observed, and on the 9th of December presented officially to the minister of foreign relations, the one a copy of his letters of recall, the other a copy of his letters of credence.

These were laid before the Executive Directory. Two days afterwards the minister of foreign relations informed the recalled American minister that the Executive Directory had determined not to re-

ceive another minister plenipotentiary from the United States until after the redress of grievances demanded of the American Government, and which the French Republic had a right to expect from it. The American minister immediately endeavored to ascertain whether by refusing to receive him it was intended that he should retire from the territories of the French Republic, and verbal answers were given that such was the intention of the Directory. For his own justification he desired a written answer, but obtained none until toward the last of January, when, receiving notice in writing to quit the territories of the Republic, he proceeded to Amsterdam, where he proposed to wait for instruction from this Government. During his residence at Paris cards of hospitality were refused him, and he was threatened with being subjected to the jurisdiction of the minister of police; but with becoming firmness he insisted on the protection of the law of nations due to him as the known minister of a foreign power. You will derive further information from his dispatches, which will be laid before you.

As it is often necessary that nations should treat for the mutual advantage of their affairs, and especially to accommodate and terminate differences, and as they can treat only by ministers, the right of embassy is well known and established by the law and usage of nations. The refusal on the part of France to receive our minister is, then, the denial of a right; but the refusal to receive him until we have acceded to their demands without discussion and without investigation is to treat us neither as allies nor as friends, nor as a sovereign state.

With this conduct of the French Government it will be proper to take into view the public audience given to the late minister of the United States on his taking leave of the Executive Directory. The speech of the President discloses sentiments more alarming than the refusal of a minister, because more dangerous to our independence and union and at the same time studiously marked with indignities toward the Government of the United States. It evinces a disposition to separate the people of the United States from the Government, to persuade them that they have different affections, principles, and interests from those of their fellow-citizens whom they themselves have chosen to manage their common concerns, and thus to produce divisions fatal to our peace. Such attempts ought to be repelled with a decision which shall convince France and the world that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority,

fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest.

I should have been happy to have thrown a veil over these transactions if it had been possible to conceal them; but they have passed on the great theater of the world, in the face of all Europe and America, and with such circumstances of publicity and solemnity that they can not be disguised and will not soon be forgotten. They have inflicted a wound in the American breast. It is my sincere desire, however, that it may be healed.

It is my sincere desire, and in this I presume I concur with you and with our constituents, to preserve peace and friendship with all nations; and believing that neither the honor nor the interest of the United States absolutely forbid the repetition of advances for securing these desirable objects with France, I shall institute a fresh attempt at negotiation, and shall not fail to promote and accelerate an accommodation on terms compatible with the rights, duties, interests, and honor of the nation. If we have committed errors, and these can be demonstrated, we shall be willing to correct them; if we have done injuries, we shall be willing on conviction to redress them; and equal measures of justice we have a right to expect from France and every other nation.

The diplomatic intercourse between the United States and France being at present suspended, the Government has no means of obtaining official information from that country. Nevertheless, there is reason to believe that the Executive Directory passed a decree on the 2d of March last contravening in part the treaty of amity and commerce of 1778, injurious to our lawful commerce and endangering the lives of our citizens. A copy of this decree will be laid before you.

While we are endeavoring to adjust all our differences with France by amicable negotiation, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and the general complexion of affairs render it my indispensable duty to recommend to your consideration effectual measures of defense.

The commerce of the United States has become an interesting object of attention, whether we consider it in relation to the wealth and finances or the strength and resources of the nation. With a seacoast of near 2,000 miles in extent, opening a wide field for fisheries, navigation, and commerce, a great portion of our citizens naturally apply

their industry and enterprise to these objects. Any serious and permanent injury to commerce would not fail to produce the most embarrassing disorders. To prevent it from being undermined and destroyed it is essential that it receive an adequate protection.

The naval establishment must occur to every man who considers the injuries committed on our commerce, the insults offered to our citizens, and the description of vessels by which these abuses have been practiced. As the sufferings of our mercantile and seafaring citizens can not be ascribed to the omission of duties demandable, considering the neutral situation of our country, they are to be attributed to the hope of impunity arising from a supposed inability on our part to afford protection. To resist the consequences of such impressions on the minds of foreign nations and to guard against the degradation and servility which they must finally stamp on the American character is an important duty of Government.

A naval power, next to the militia, is the natural defense of the United States. The experience of the last war would be sufficient to shew that a moderate naval force, such as would be easily within the present abilities of the Union, would have been sufficient to have baffled many formidable transportations of troops from one State to another, which were then practiced. Our seacoasts, from their great extent, are more easily annoyed and more easily defended by a naval force than any other. With all the materials our country abounds; in skill our naval architects and navigators are equal to any, and commanders and seamen will not be wanting.

But although the establishment of a permanent system of naval defense appears to be requisite, I am sensible it can not be formed so speedily and extensively as the present crisis demands. Hitherto I have thought proper to prevent the sailing of armed vessels except on voyages to the East Indies, where general usage and the danger from pirates appeared to render the permission proper. Yet the restriction has originated solely from a wish to prevent collisions with the powers at war, contravening the act of Congress of June, 1794, and not from any doubt entertained by me of the policy and propriety of permitting our vessels to employ means of defense while engaged in a lawful foreign commerce. It remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them

from committing acts of hostility against the powers at war. In addition to this voluntary provision for defense by individual citizens, it appears to me necessary to equip the frigates, and provide other vessels of inferior force, to take under convoy such merchant vessels as shall remain unarmed.

The greater part of the cruisers whose depredations have been most injurious have been built and some of them partially equipped in the United States. Although an effectual remedy may be attended with difficulty, yet I have thought it my duty to present the subject generally to your consideration. If a mode can be devised by the wisdom of Congress to prevent the resources of the United States from being converted into the means of annoying our trade, a great evil will be prevented. With the same view, I think it proper to mention that some of our citizens resident abroad have fitted out privateers, and others have voluntarily taken the command, or entered on board of them, and committed spoliations on the commerce of the United States. Such unnatural and iniquitous practices can be restrained only by severe punishments.

But besides a protection of our commerce on the seas, I think it highly necessary to protect it at home, where it is collected in our most important ports. The distance of the United States from Europe and the well-known promptitude, ardor, and courage of the people in defense of their country happily diminish the probability of invasion. Nevertheless, to guard against sudden and predatory incursions the situation of some of our principal seaports demands your consideration. And as our country is vulnerable in other interests besides those of its commerce, you will seriously deliberate whether the means of general defense ought not to be increased by an addition to the regular artillery and cavalry, and by arrangements for forming a provisional army.

With the same view, and as a measure which, even in a time of universal peace, ought not to be neglected, I recommend to your consideration a revision of the laws for organizing, arming, and disciplining the militia, to render that natural and safe defense of the country efficacious.

Although it is very true that we ought not to involve ourselves in the political system of Europe, but to keep ourselves always distinct and separate from it if we can, yet to effect this separation, early, punctual, and continual information of the current chain of events and

of the political projects in contemplation is no less necessary than if we were directly concerned in them. It is necessary, in order to the discovery of the efforts made to draw us into the vortex, in season to make preparations against them. However we may consider ourselves, the maritime and commercial powers of the world will consider the United States of America as forming a weight in that balance of power in Europe which never can be forgotten or neglected. It would not only be against our interest, but it would be doing wrong to one-half of Europe, at least, if we should voluntarily throw ourselves into either scale. It is a natural policy for a nation that studies to be neutral to consult with other nations engaged in the same studies and pursuits. At the same time that measures might be pursued with this view, our treaties with Prussia and Sweden, one of which is expired and the other near expiring, might be renewed.

Address of the Senate to John Adams, President of the United States¹

SIR: The Senate of the United States request you to accept their acknowledgments for the comprehensive and interesting detail you have given in your speech to both Houses of Congress on the existing state of the Union.

While we regret the necessity of the present meeting of the Legislature, we wish to express our entire approbation of your conduct in convening it on this momentous occasion.

The superintendence of our national faith, honor, and dignity being in a great measure constitutionally deposited with the Executive, we observe with singular satisfaction the vigilance, firmness, and promptitude exhibited by you in this critical state of our public affairs, and from thence derive an evidence and pledge of the rectitude and integrity of your Administration. And we are sensible it is an object of primary importance that each branch of the Government should adopt a language and system of conduct which shall be cool, just, and dispassionate, but firm, explicit, and decided.

We are equally desirous with you to preserve peace and friendship with all nations, and are happy to be informed that neither the honor nor interests of the United States forbid advances for securing those

¹Richardson, Messages, vol. 1, p. 239.

desirable objects by amicable negotiation with the French Republic. This method of adjusting national differences is not only the most mild, but the most rational and humane, and with governments disposed to be just can seldom fail of success when fairly, candidly, and sincerely used. If we have committed errors and can be made sensible of them, we agree with you in opinion that we ought to correct them, and compensate the injuries which may have been consequent thereon; and we trust the French Republic will be actuated by the same just and benevolent principles of national policy.

We do therefore most sincerely approve of your determination to promote and accelerate an accommodation of our existing differences with that Republic by negotiation, on terms compatible with the rights, duties, interests, and honor of our nation. And you may rest assured of our most cordial coöperation so far as it may become necessary in this pursuit.

Peace and harmony with all nations is our sincere wish; but such being the lot of humanity that nations will not always reciprocate peaceable dispositions, it is our firm belief that effectual measures of defense will tend to inspire that national self-respect and confidence at *home* which is the unfailing source of respectability *abroad*, to check aggression and prevent war.

While we are endeavoring to adjust our differences with the French Republic by amicable negotiation, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and the general complexion of affairs prove to us your vigilant care in recommending to our attention effectual measures of defense.

Those which you recommend, whether they relate to external defense by permitting our citizens to arm for the purpose of repelling aggressions on their commercial rights, and by providing sea convoys, or to internal defense by increasing the establishments of artillery and cavalry, by forming a provisional army, by revising the militia laws, and fortifying more completely our ports and harbors, will meet our consideration under the influence of the same just regard for the security, interest, and honor of our country which dictated your recommendation.

Practices so unnatural and iniquitous as those you state, of our own citizens converting their property and personal exertions into the means of annoying our trade and injuring their fellow-citizens, deserve legal severity commensurate with their turpitude.

Although the Senate believe that the prosperity and happiness of our country does not depend on general and extensive political connections with European nations, yet we can never lose sight of the propriety as well as necessity of enabling the Executive, by sufficient and liberal supplies, to maintain and even extend our foreign intercourse as exigencies may require, reposing full confidence in the Executive, in whom the Constitution has placed the powers of negotiation.

We learn with sincere concern that attempts are in operation to alienate the affections of our fellow-citizens from their Government. Attempts so wicked, wherever they exist, can not fail to excite our utmost abhorrence. A government chosen by the people for their own safety and happiness, and calculated to secure both, can not lose their affections so long as its administration pursues the principles upon which it was erected; and your resolution to observe a conduct just and impartial to all nations, a sacred regard to our national engagements, and not to impair the rights of our Government, contains principles which can not fail to secure to your Administration the support of the National Legislature to render abortive every attempt to excite dangerous jealousies among us, and to convince the world that our Government and your administration of it can not be separated from the affectionate support of every good citizen. And the Senate can not suffer the present occasion to pass without thus publicly and solemnly expressing their attachment to the Constitution and Government of their country; and as they hold themselves responsible to their constituents, their consciences, and their God, it is their determination by all their exertions to repel every attempt to alienate the affections of the people from the Government, so highly injurious to the honor, safety, and independence of the United States.

We are happy, since our sentiments on the subject are in perfect unison with yours, in this public manner to declare that we believe the conduct of the Government has been just and impartial to foreign nations, and that those internal regulations which have been established for the preservation of peace are in their nature proper and have been fairly executed.

And we are equally happy in possessing an entire confidence in your abilities and exertions in your station to maintain untarnished the honor, preserve the peace, and support the independence of our country, to acquire and establish which, in connection with your fellow-

citizens, has been the virtuous effort of a principal part of your life.

To aid you in these arduous and honorable exertions, as it is our duty so it shall be our faithful endeavor; and we flatter ourselves, sir, that the proceedings of the present session of Congress will manifest to the world that although the United States love peace, they will be independent; that they are sincere in their declarations to be just to the French and all other nations, and expect the same in return.

If a sense of justice, a love of moderation and peace, shall influence their councils, which we sincerely hope we shall have just grounds to expect, peace and amity between the United States and all nations will be preserved.

But if we are so unfortunate as to experience injuries from any foreign power, and the ordinary methods by which differences are amicably adjusted between nations shall be rejected, the determination "not to surrender in any manner the rights of the Government," being so inseparably connected with the dignity, interest, and independence of our country, shall by us be steadily and inviolably supported.

TH: JEFFERSON,

Vice-President of the United States and President of the Senate.
MAY 23, 1797.

Reply of the President¹

Mr. Vice-President and Gentlemen of the Senate:

It would be an affectation in me to dissemble the pleasure I feel on receiving this kind address.

My long experience of the wisdom, fortitude, and patriotism of the Senate of the United States enhances in my estimation the value of those obliging expressions of your approbation of my conduct, which are a generous reward for the past and an affecting encouragement to constancy and perseverance in future.

Our sentiments appear to be so entirely in unison that I can not but believe them to be the rational result of the understandings and the natural feelings of the hearts of Americans in general on contemplating the present state of the nation.

While such principles and affections prevail they will form an indissoluble bond of union and a sure pledge that our country has no

¹Richardson, Messages, vol. 1, p. 242.

essential injury to apprehend from any portentous appearances abroad. In a humble reliance on Divine Providence we may rest assured that while we reiterate with sincerity our endeavors to accommodate all our differences with France, the independence of our country can not be diminished, its dignity degraded, or its glory tarnished by any nation or combination of nations, whether friends or enemies.

JOHN ADAMS.

MAY 24, 1797.

*Address of the House of Representatives to John Adams, President of the United States*¹

SIR: The interesting details of those events which have rendered the convention of Congress at this time indispensable (communicated in your speech to both Houses) has excited in us the strongest emotions. Whilst we regret the occasion, we can not omit to testify our approbation of the measure, and pledge ourselves that no considerations of private inconvenience shall prevent on our part a faithful discharge of the duties to which we are called.

We have constantly hoped that the nations of Europe, whilst desolated by foreign wars or convulsed by intestine divisions, would have left the United States to enjoy that peace and tranquillity to which the impartial conduct of our Government has entitled us, and it is now with extreme regret we find the measures of the French Republic tending to endanger a situation so desirable and interesting to our country.

Upon this occasion we feel it our duty to express in the most explicit manner the sensations which the present crisis has excited, and to assure you of our zealous coöperation in those measures which may appear necessary for our security or peace.

Although it is the earnest wish of our hearts that peace may be maintained with the French Republic and with all the world, yet we never will surrender those rights which belong to us as a nation; and whilst we view with satisfaction the wisdom, dignity, and moderation which have marked the measures of the Supreme Executive of our country in his attempt to remove by candid explanations the complaints and jealousies of France, we feel the full force of that indignity which

¹Richardson, Messages, vol. 1, p. 242.

has been offered our country in the rejection of its minister. No attempts to wound our rights as a sovereign State will escape the notice of our constituents. They will be felt with indignation and repelled with that decision which shall convince the world that we are not a degraded people; that we can never submit to the demands of a foreign power without examination and without discussion.

Knowing as we do the confidence reposed by the people of the United States in their Government, we can not hesitate in expressing our indignation at any sentiments tending to derogate from that confidence. Such sentiments, wherever entertained, serve to evince an imperfect knowledge of the opinions of our constituents. An attempt to separate the people of the United States from their Government is an attempt to separate them from themselves; and although foreigners who know not the genius of our country may have conceived the project, and foreign emissaries may attempt the execution, yet the united efforts of our fellow-citizens will convince the world of its impracticability.

Sensibly as we feel the wound which has been inflicted by the transactions disclosed in your communications, yet we think with you that neither the honor nor the interest of the United States forbid the repetition of advances for preserving peace; we therefore receive with the utmost satisfaction your information that a fresh attempt at negotiation will be instituted, and we cherish the hope that a mutual spirit of conciliation, and a disposition on the part of France to compensate for any injuries which may have been committed upon our neutral rights, and on the part of the United States to place France on grounds similar to those of other countries in their relation and connection with us (if any inequalities shall be found to exist), will produce an accommodation compatible with the engagements, rights, duties, and honor of the United States. Fully, however, impressed with the uncertainty of the result, we shall prepare to meet with fortitude any unfavorable events which may occur, and to extricate ourselves from their consequences with all the skill we possess and all the efforts in our power. Believing with you that the conduct of the Government has been just and impartial to foreign nations, that the laws for the preservation of peace have been proper, and that they have been fairly executed, the Representatives of the people do not hesitate to declare that they will give their most cordial support to the execution of principles so deliberately and uprightly established.

The many interesting subjects which you have recommended to our consideration, and which are so strongly enforced by this momentous occasion, will receive every attention which their importance demands, and we trust that, by the decided and explicit conduct which will govern our deliberations, every insinuation will be repelled which is derogatory to the honor and independence of our country.

Permit us in offering this address to express our satisfaction at your promotion to the first office in the Government and our entire confidence that the preëminent talents and patriotism which have placed you in this distinguished situation will enable you to discharge its various duties with satisfaction to yourself and advantage to our common country.

JUNE 2, 1797.

Reply of the President¹

Mr. Speaker and Gentlemen of the House of Representatives:

I receive with great satisfaction your candid approbation of the convention of Congress, and thank you for your assurances that the interesting subjects recommended to your consideration shall receive the attention which their importance demands, and that your cooperation may be expected in those measures which may appear necessary for our security or peace.

The declarations of the Representatives of this nation of their satisfaction at my promotion to the first office in this Government and of their confidence in my sincere endeavors to discharge the various duties of it with advantage to our common country have excited my most grateful sensibility.

I pray you, gentlemen, to believe and to communicate such assurance to our constituents that no event which I can foresee to be attainable by any exertions in the discharge of my duties can afford me so much cordial satisfaction as to conduct a negotiation with the French Republic to a removal of prejudices, a correction of errors, a dissipation of umbrages, an accommodation of all differences, and a restoration of harmony and affection to the mutual satisfaction of both nations. And whenever the legitimate organs of intercourse shall be restored and the real sentiments of the two Governments can be candidly communicated

¹Richardson, Messages, vol. 1, p. 244.

to each other, although strongly impressed with the necessity of collecting ourselves into a manly posture of defense, I nevertheless entertain an encouraging confidence that a mutual spirit of conciliation, a disposition to compensate injuries and accommodate each other in all our relations and connections, will produce an agreement to a treaty consistent with the engagements, rights, duties, and honor of both nations.

JOHN ADAMS.

JUNE 3, 1797.

FIRST ANNUAL ADDRESS ¹

UNITED STATES, *November 22, 1797.*

*Gentlemen of the Senate and Gentlemen of the House of
Representatives:*

Although I can not yet congratulate you on the reëstablishment of peace in Europe and the restoration of security to the persons and properties of our citizens from injustice and violence at sea, we have, nevertheless, abundant cause of gratitude to the source of benevolence and influence for interior tranquillity and personal security, for propitious seasons, prosperous agriculture, productive fisheries, and general improvements, and, above all, for a rational spirit of civil and religious liberty and a calm but steady determination to support our sovereignty, as well as our moral and our religious principles, against all open and secret attacks.

Our envoys extraordinary to the French Republic embarked—one in July, the other early in August—to join their colleague in Holland. I have received intelligence of the arrival of both of them in Holland, from whence they all proceeded on their journeys to Paris within a few days of the 19th of September. Whatever may be the result of this mission, I trust that nothing will have been omitted on my part to conduct the negotiation to a successful conclusion, on such equitable terms as may be compatible with the safety, honor, and interest of the United States. Nothing, in the meantime, will contribute so much to the preservation of peace and the attainment of justice as a manifestation of that energy and unanimity of which on many former occasions the people of the United States have given such memorable proofs,

¹Richardson, Messages, vol. 1, p. 250.

and the exertion of those resources for national defense which a beneficent Providence has kindly placed within their power.

It may be confidently asserted that nothing has occurred since the adjournment of Congress which renders inexpedient those precautionary measures recommended by me to the consideration of the two Houses at the opening of your late extraordinary session. If that system was then prudent, it is more so now, as increasing depredations strengthen the reasons for its adoption.

Indeed, whatever may be the issue of the negotiation with France, and whether the war in Europe is or is not to continue, I hold it most certain that permanent tranquillity and order will not soon be obtained. The state of society has so long been disturbed, the sense of moral and religious obligations so much weakened, public faith and national honor have been so impaired, respect to treaties has been so diminished, and the law of nations has lost so much of its force, while pride, ambition, avarice, and violence have been so long unrestrained, there remains no reasonable ground on which to raise an expectation that a commerce without protection or defense will not be plundered.

The commerce of the United States is essential, if not to their existence, at least to their comfort, their growth, prosperity, and happiness. The genius, character, and habits of the people are highly commercial. Their cities have been formed and exist upon commerce. Our agriculture, fisheries, arts, and manufactures are connected with and depend upon it. In short, commerce has made this country what it is, and it can not be destroyed or neglected without involving the people in poverty and distress. Great numbers are directly and solely supported by navigation. The faith of society is pledged for the preservation of the rights of commercial and seafaring no less than of the other citizens. Under this view of our affairs, I should hold myself guilty of a neglect of duty if I forbore to recommend that we should make every exertion to protect our commerce and to place our country in a suitable posture of defense as the only sure means of preserving both.

*Address of the Senate to John Adams, President of the United States*¹

THE PRESIDENT OF THE UNITED STATES:

It would have given us much pleasure to have received your con-

¹Richardson, Messages, vol. 1, p. 254.

gratulations on the reestablishment of peace in Europe and the restoration of security to the persons and property of our citizens from injustice and violence at sea ; but though these events, so desirable to our country and the world, have not taken place, yet we have abundant cause of gratitude to the Great Disposer of Human Events for interior tranquillity and personal security, for propitious seasons, prosperous agriculture, productive fisheries, and general improvement, and, above all, for a rational spirit of civil and religious liberty and a calm but steady determination to support our sovereignty against all open and secret attacks.

We learn with satisfaction that our envoys extraordinary to the French Republic had safely arrived in Europe and were proceeding to the scene of negotiation, and whatever may be the result of the mission, we are perfectly satisfied that nothing on your part has been omitted which could in any way conduce to a successful conclusion of the negotiation upon terms compatible with the safety, honor, and interest of the United States; and we are fully convinced that in the meantime a manifestation of that unanimity and energy of which the people of the United States have given such memorable proofs and a proper exertion of those resources of national defense which we possess will essentially contribute to the preservation of peace and the attainment of justice.

We think, sir, with you that the commerce of the United States is essential to the growth, comfort, and prosperity of our country, and that the faith of society is pledged for the preservation of the rights of commercial and seafaring no less than of other citizens. And even if our negotiation with France should terminate favorably and the war in Europe cease, yet the state of society which unhappily prevails in so great a portion of the world and the experience of past times under better circumstances unite in warning us that a commerce so extensive and which holds out so many temptations to lawless plunderers can never be safe without protection; and we hold ourselves obliged by every tie of duty which binds us to our constituents to promote and concur in such measures of marine defense as may convince our merchants and seamen that their rights are not sacrificed nor their injuries forgotten.

Nov. 27, 1797.

Reply of the President¹

UNITED STATES, November 28, 1797.

Gentlemen of the Senate:

I thank you for this address.

When, after the most laborious investigation and serious reflection, without partial considerations or personal motives, measures have been adopted or recommended, I can receive no higher testimony of their rectitude than the approbation of an assembly so independent, patriotic, and enlightened as the Senate of the United States.

Nothing has afforded me more entire satisfaction than the coincidence of your judgment with mine in the opinion of the essential importance of our commerce and the absolute necessity of a maritime defense. What is it that has drawn to Europe the superfluous riches of the three other quarters of the globe but a marine? What is it that has drained the wealth of Europe itself into the coffers of two or three of its principal commercial powers but a marine?

The world has furnished no example of a flourishing commerce without a maritime protection, and a moderate knowledge of man and his history will convince anyone that no such prodigy ever can arise. A mercantile marine and a military marine must grow up together; one can not long exist without the other.

JOHN ADAMS.

Address of the House of Representatives to John Adams, President of the United States²

In lamenting the increase of the injuries offered to the persons and property of our citizens at sea we gratefully acknowledge the continuance of interior tranquillity and the attendant blessings of which you remind us as alleviations of these fatal effects of injustice and violence.

Whatever may be the result of the mission to the French Republic, your early and uniform attachment to the interest of our country, your important services in the struggle for its independence, and your unceasing exertions for its welfare afford no room to doubt of the sincerity of your efforts to conduct the negotiation to a successful conclusion on such terms as may be compatible with the safety, honor, and

¹Richardson, Messages, vol. 1, p. 256.

²Ibid., p. 257.

interest of the United States. We have also a firm reliance upon the energy and unanimity of the people of these States in the assertion of their rights, and on their determination to exert upon all proper occasions their ample resources in providing for the national defense.

The importance of commerce and its beneficial influence upon agriculture, arts, and manufactures have been verified in the growth and prosperity of our country. It is essentially connected with the other great interests of the community; they must flourish and decline together; and while the extension of our navigation and trade naturally excites the jealousy and tempts the avarice of other nations, we are firmly persuaded that the numerous and deserving class of citizens engaged in these pursuits and dependent on them for their subsistence has a strong and indisputable claim to our support and protection.

Nov. 28, 1797.

Reply of the President¹

UNITED STATES, November 29, 1797.

Gentlemen of the House of Representatives:

I receive this address from the House of Representatives of the United States with peculiar pleasure.

Your approbation of the meeting of Congress in this city and of those other measures of the Executive authority of Government communicated in my address to both Houses at the opening of the session afford me great satisfaction, as the strongest desire of my heart is to give satisfaction to the people and their Representatives by a faithful discharge of my duty.

The confidence you express in the sincerity of my endeavors and in the unanimity of the people does me much honor and gives me great joy.

I rejoice in that harmony which appears in the sentiments of all the branches of the Government on the importance of our commerce and our obligations to defend it, as well as in all the other subjects recommended to your consideration, and sincerely congratulate you and our fellow-citizens at large on this appearance, so auspicious to the honor, interest, and happiness of the nation.

¹Richardson, Messages, vol. 1, p. 258.

SECOND ANNUAL ADDRESS ¹UNITED STATES, *December 8, 1798.**Gentlemen of the Senate and Gentlemen of the House of
Representatives:*

The course of the transactions in relation to the United States and France which have come to my knowledge during your recess will be made the subject of a future communication. That communication will confirm the ultimate failure of the measures which have been taken by the Government of the United States toward an amicable adjustment of differences with that power. You will at the same time perceive that the French Government appears solicitous to impress the opinion that it is averse to a rupture with this country, and that it has in a qualified manner declared itself willing to receive a minister from the United States for the purpose of restoring a good understanding. It is unfortunate for professions of this kind that they should be expressed in terms which may countenance the inadmissible pretension of a right to prescribe the qualifications which a minister from the United States should possess, and that while France is asserting the existence of a disposition on her part to conciliate with sincerity the differences which have arisen, the sincerity of a like disposition on the part of the United States, of which so many demonstrative proofs have been given, should even be indirectly questioned. It is also worthy of observation that the decree of the Directory alleged to be intended to restrain the depredations of French cruisers on our commerce has not given, and can not give, any relief. It enjoins them to conform to all the laws of France relative to cruising and prizes, while these laws are themselves the sources of the depredations of which we have so long, so justly, and so fruitlessly complained.

The law of France enacted in January last, which subjects to capture and condemnation neutral vessels and their cargoes if any portion of the latter are of British fabric or produce, although the entire property belong to neutrals, instead of being rescinded has lately received a confirmation by the failure of a proposition for its repeal. While this law, which is an unequivocal act of war on the commerce of the nations it attacks, continues in force those nations can see in the French Government only a power regardless of their essential rights, of their independence and sovereignty; and if they possess the means they can reconcile nothing with their interest and honor but a firm resistance.

¹Richardson, Messages, vol. 1, p. 271.

Hitherto, therefore, nothing is discoverable in the conduct of France which ought to change or relax our measures of defense. On the contrary, to extend and invigorate them is our true policy. We have no reason to regret that these measures have been thus far adopted and pursued, and in proportion as we enlarge our view of the portentous and incalculable situation of Europe we shall discover new and cogent motives for the full development of our energies and resources.

But in demonstrating by our conduct that we do not fear war in the necessary protection of our rights and honor we shall give no room to infer that we abandon the desire of peace. An efficient preparation for war can alone insure peace. It is peace that we have uniformly and perseveringly cultivated, and harmony between us and France may be restored at her option. But to send another minister without more determinate assurances that he would be received would be an act of humiliation to which the United States ought not to submit. It must therefore be left with France (if she is indeed desirous of accommodation) to take the requisite steps. The United States will steadily observe the maxims by which they have hither been governed. They will respect the sacred rights of embassy; and with a sincere disposition on the part of France to desist from hostility, to make reparation for the injuries heretofore inflicted on our commerce, and to do justice in future, there will be no obstacle to the restoration of a friendly intercourse. In making to you this declaration I give a pledge to France and the world that the Executive authority of this country still adheres to the humane and pacific policy which has invariably governed its proceedings, in conformity with the wishes of the other branches of the Government and of the people of the United States. But considering the late manifestations of her policy toward foreign nations, I deem it a duty deliberately and solemnly to declare my opinion that whether we negotiate with her or not, vigorous preparations for war will be alike indispensable. These alone will give to us an equal treaty and insure its observance.

Among the measures of preparation which appear expedient, I take the liberty to recall your attention to the naval establishment. The beneficial effects of the small naval armament provided under the acts of the last session are known and acknowledged. Perhaps no country ever experienced more sudden and remarkable advantages from any measure of policy than we have derived from the arming for our maritime protection and defense. We ought without loss of time to lay the

foundation for an increase of our Navy to a size sufficient to guard our coast and protect our trade. Such a naval force as it is doubtless in the power of the United States to create and maintain would also afford to them the best means of general defense by facilitating the safe transportation of troops and stores to every part of our extensive coast. To accomplish this important object, a prudent foresight requires that systematical measures be adopted for procuring at all times the requisite timber and other supplies. In what manner this shall be done I leave to your consideration.

*Address of the Senate to John Adams, President of the United States*¹

THE PRESIDENT OF THE UNITED STATES:

Although we have sincerely wished that an adjustment of our differences with the Republic of France might be effected on safe and honorable terms, yet the information you have given us of the ultimate failure of the negotiation has not surprised us. In the general conduct of that Republic we have seen a design of universal influence incompatible with the self-government and destructive of the independence of other States. In its conduct toward these United States we have seen a plan of hostility pursued with unremitted constancy, equally disregarding the obligations of treaties and the rights of individuals. We have seen two embassies, formed for the purpose of mutual explanations and clothed with the most extensive and liberal powers, dismissed without recognition and even without a hearing. The Government of France has not only refused to repeal but has recently enjoined the observance of its former edict respecting merchandise of British fabric or produce the property of neutrals, by which the interruption of our lawful commerce and the spoliation of the property of our citizens have again received a public sanction. These facts indicate no change of system or disposition; they speak a more intelligible language than professions of solicitude to avoid a rupture, however ardently made. But if, after the repeated proofs we have given of a sincere desire for peace, these professions should be accompanied by insinuations implicating the integrity with which it has been pursued; if, neglecting and passing by the constitutional and authorized agents of the Government, they are made through the medium of individuals without public

¹Richardson, Messages, vol. 1, p. 275.

character or authority, and, above all, if they carry with them a claim to prescribe the political qualifications of the minister of the United States to be employed in the negotiation, they are not entitled to attention or consideration, but ought to be regarded as designed to separate the people from their Government and to bring about by intrigue that which open force could not effect.

We are of opinion with you, sir, that there has nothing yet been discovered in the conduct of France which can justify a relaxation of the means of defense adopted during the last session of Congress, the happy result of which is so strongly and generally marked. If the force by sea and land which the existing laws authorize should be judged inadequate to the public defense, we will perform the indispensable duty of bringing forward such other acts as will effectually call forth the resources and force of our country.

A steady adherence to this wise and manly policy, a proper direction of the noble spirit of patriotism which has arisen in our country, and which ought to be cherished and invigorated by every branch of the Government, will secure our liberty and independence against all open and secret attacks.

We enter on the business of the present session with an anxious solicitude for the public good, and shall bestow that consideration on the several objects pointed out in your communication which they respectively merit.

Your long and important services, your talents and firmness, so often displayed in the most trying times and most critical situations, afford a sure pledge of a zealous coöperation in every measure necessary to secure us justice and respect,

JOHN LAURANCE,
President of the Senate pro tempore.

DECEMBER 11, 1798.

Reply of the President¹

December 12, 1798.

To the Senate of the United States:

GENTLEMEN: I thank you for this address, so conformable to the spirit of our Constitution and the established character of the Senate of the United States for wisdom, honor, and virtue.

¹Richardson, Messages, vol. 1, p. 277.

I have seen no real evidence of any change of system or disposition in the French Republic toward the United States. Although the officious interference of individuals without public character or authority is not entitled to any credit, yet it deserves to be considered whether that temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States, whether by their secret correspondence or otherwise, and intended to impose upon the people and separate them from their Government, ought not to be inquired into and corrected.

I thank you, gentlemen, for your assurances that you will bestow that consideration on the several objects pointed out in my communication which they respectively merit.

If I have participated in that understanding, sincerity, and constancy which have been displayed by my fellow-citizens and countrymen in the most trying times and critical situations, and fulfilled my duties to them, I am happy. The testimony of the Senate of the United States in my favor is an high and honorable reward which receives, as it merits, my grateful acknowledgments. My zealous cooperation in measures necessary to secure us justice and consideration may be always depended on.

JOHN ADAMS.

*Address of the House of Representatives to John Adams, President of the United States*¹

JOHN ADAMS,
President of the United States.

Desirous as we are that all causes of hostility may be removed by the amicable adjustment of national differences, we learn with satisfaction that in pursuance of our treaties with Spain and with Great Britain advances have been made for definitively settling the controversies relative to the southern and northeastern limits of the United States. With similar sentiments have we received your information that the proceedings under commissions authorized by the same treaties afford to a respectable portion of our citizens the prospect of a final decision on their claims for maritime injuries committed by subjects of those powers.

¹Richardson, *Messages*, vol. 1, p. 277.

It would be the theme of mutual felicitation were we assured of experiencing similar moderation and justice from the French Republic, between which and the United States differences have unhappily arisen; but this is denied us by the ultimate failure of the measures which have been taken by this Government toward an amicable adjustment of those differences and by the various inadmissible pretensions on the part of that nation.

The continuing in force the decree of January last, to which you have more particularly pointed our attention, ought of itself to be considered as demonstrative of the real intentions of the French Government. That decree proclaims a predatory warfare against the unquestionable rights of neutral commerce which with our means of defense our interest and our honor command us to repel. It therefore now becomes the United States to be as determined in resistance as they have been patient in suffering and condescending in negotiation.

While those who direct the affairs of France persist in the enforcement of decrees so hostile to our essential rights, their conduct forbids us to confide in any of their professions of amity.

As, therefore, the conduct of France hitherto exhibits nothing which ought to change or relax our measures of defense, the policy of extending and invigorating those measures demands our sedulous attention. The sudden and remarkable advantages which this country has experienced from a small naval armament sufficiently prove the utility of its establishment. As it respects the guarding of our coast, the protection of our trade, and the facility of safely transporting the means of territorial defense to every part of our maritime frontier, an adequate naval force must be considered as an important object of national policy. Nor do we hesitate to adopt the opinion that, whether negotiations with France are resumed or not, vigorous preparations for war will be alike indispensable.

In this conjuncture of affairs, while with you we recognize our abundant cause of gratitude to the Supreme Disposer of Events for the ordinary blessings of Providence, we regard as of high national importance the manifestation in our country of a magnanimous spirit of resistance to foreign domination. This spirit merits to be cherished and invigorated by every branch of Government as the estimable pledge of national prosperity and glory.

Disdaining a reliance on foreign protection, wanting no foreign guaranty of our liberties, resolving to maintain our national independence

against every attempt to despoil us of this inestimable treasure, we confide under Providence in the patriotism and energies of the people of these United States for defeating the hostile enterprises of any foreign power.

To adopt with prudent foresight such systematical measures as may be expedient for calling forth those energies wherever the national exigencies may require, whether on the ocean or on our own territory, and to reconcile with the proper security of revenue the convenience of mercantile enterprise, on which so great a proportion of the public resources depends, are objects of moment which shall be duly regarded in the course of our deliberations.

Fully as we accord with you in the opinion that the United States ought not to submit to the humiliation of sending another minister to France without previous assurances sufficiently determinate that he will be duly accredited, we have heard with cordial approbation the declaration of your purpose steadily to observe those maxims of humane and pacific policy by which the United States have hitherto been governed. While it is left with France to take the requisite steps for accommodation, it is worthy the Chief Magistrate of a free people to make known to the world that justice on the part of France will annihilate every obstacle to the restoration of a friendly intercourse, and that the Executive authority of this country will respect the sacred rights of embassy. At the same time, the wisdom and decision which have characterized your past Administration assure us that no illusory professions will seduce you into any abandonment of the rights which belong to the United States as a free and independent nation.

DECEMBER 13, 1798.

*Reply of the President*¹

DECEMBER 14, 1798.

To the House of Representatives of the United States of America.

GENTLEMEN: My sincere acknowledgments are due to the House of Representatives of the United States for this excellent address so consonant to the character of representatives of a great and free people. The judgment and feelings of a nation, I believe, were never more truly expressed by their representatives than those of our constituents

¹Richardson, Messages, vol. 1, p. 280.

by your decided declaration that with our means of defense our interest and honor command us to repel a predatory warfare against the unquestionable rights of neutral commerce; that it becomes the United States to be as determined in resistance as they have been patient in suffering and condescending in negotiation; that while those who direct the affairs of France persist in the enforcement of decrees so hostile to our essential rights their conduct forbids us to confide in any of their professions of amity; that an adequate naval force must be considered as an important object of national policy, and that, whether negotiations with France are resumed or not, vigorous preparations for war will be alike indispensable.

The generous disdain you so coolly and deliberately express of a reliance on foreign protection, wanting no foreign guaranty of our liberties, resolving to maintain our national independence against every attempt to despoil us of this inestimable treasure, will meet the full approbation of every sound understanding and exulting applauses from the heart of every faithful American.

I thank you, gentlemen, for your candid approbation of my sentiments on the subject of negotiation and for the declaration of your opinion that the policy of extending and invigorating our measures of defense and the adoption with prudent foresight of such systematical measures as may be expedient for calling forth the energies of our country wherever the national exigencies may require, whether on the ocean or on our own territory, will demand your sedulous attention.

At the same time, I take the liberty to assure you it shall be my vigilant endeavor that no illusory professions shall seduce me into any abandonment of the rights which belong to the United States as a free and independent nation.

JOHN ADAMS.

THIRD ANNUAL ADDRESS ¹

UNITED STATES, *December 3, 1799.*

Gentlemen of the Senate and Gentlemen of the House of

Representatives:

Persevering in the pacific and humane policy which had been invariably professed and sincerely pursued by the Executive authority of the United States, when indications were made on the part of the

¹Richardson, *Messages*, vol. 1, pp. 289-290.

French Republic of a disposition to accommodate the existing differences between the two countries, I felt it to be my duty to prepare for meeting their advances by a nomination of ministers upon certain conditions which the honor of our country dictated, and which its moderation had given it a right to prescribe. The assurances which were required of the French Government previous to the departure of our envoys have been given through their minister of foreign relations, and I have directed them to proceed on their mission to Paris. They have full power to conclude a treaty, subject to the constitutional advice and consent of the Senate. The characters of these gentlemen are sure pledges to their country that nothing incompatible with its honor or interest, nothing inconsistent with our obligations of good faith or friendship to any other nation, will be stipulated.

JOHN ADAMS.

*Address of the Senate to John Adams, President of the United States*¹

THE PRESIDENT OF THE UNITED STATES:

When we reflect upon the uncertainty of the result of the late mission to France and upon the uncommon nature, extent, and aspect of the war now raging in Europe, which affects materially our relations with the powers at war, and which has changed the condition of their colonies in our neighborhood, we are of opinion with you that it would be neither wise nor safe to relax our measures of defense or to lessen any of our preparations to repel aggression.

SAMUEL LIVERMORE,

President of the Senate pro tempore.

DECEMBER 9, 1799.

*Address of the House of Representatives to John Adams, President of the United States*²

THE PRESIDENT OF THE UNITED STATES:

Highly approving as we do the pacific and humane policy which has been invariably professed and sincerely pursued by the Executive au-

¹Richardson, Messages, vol. 1, p. 292.

²Ibid., p. 293.

thority of the United States, a policy which our best interests enjoined, and of which honor has permitted the observance, we consider as the most unequivocal proof of your inflexible perseverance in the same well-chosen system your preparation to meet the first indications on the part of the French Republic of a disposition to accommodate the existing differences between the two countries by a nomination of ministers, on certain conditions which the honor of our country unquestionably dictated, and which its moderation had certainly given it a right to prescribe. When the assurances thus required of the French Government, previous to the departure of our envoys, had been given through their minister of foreign relations, the direction that they should proceed on their mission was on your part a completion of the measure, and manifests the sincerity with which it was commenced. We offer up our fervent prayers to the Supreme Ruler of the Universe for the success of their embassy, and that it may be productive of peace and happiness to our common country. The uniform tenor of your conduct through a life useful to your fellow-citizens and honorable to yourself gives a sure pledge of the sincerity with which the avowed objects of the negotiation will be pursued on your part, and we earnestly pray that similar dispositions may be displayed on the part of France. The differences which unfortunately subsist between the two nations can not fail in that event to be happily terminated. To produce this end, to all so desirable, firmness, moderation, and union at home constitute, we are persuaded, the surest means. The character of the gentlemen you have deputed, and still more the character of the Government which deposes them, are safe pledges to their country that nothing incompatible with its honor or interest, nothing inconsistent with our obligations of good faith or friendship to any other nation, will be stipulated.

We learn with pleasure that our citizens, with their property, trading to those ports of St. Domingo with which commercial intercourse has been renewed have been duly respected, and that privateering from those ports has ceased.

DECEMBER 9, 1799.

*Reply of the President*¹UNITED STATES, *December 10, 1799.**Gentlemen of the House of Representatives:*

As long as we maintain with harmony and affection the honor of our country consistently with its peace, externally and internally, while that is attainable, or in war when that becomes necessary, assert its real independence and sovereignty, and support the constitutional energies and dignity of its Government, we may be perfectly sure, under the smiles of Divine Providence, that we shall effectually promote and extend our national interest and happiness.

JOHN ADAMS.

FOURTH ANNUAL ADDRESS²UNITED STATES, *November 22, 1800.**Gentlemen of the Senate and Gentlemen of the House of Representatives:*

The envoys extraordinary and ministers plenipotentiary from the United States to France were received by the First Consul with the respect due to their character, and three persons with equal powers were appointed to treat with them. Although at the date of the last official intelligence the negotiation had not terminated, yet it is to be hoped that our efforts to effect an accommodation will at length meet with a success proportioned to the sincerity with which they have been so often repeated.

While our best endeavors for the preservation of harmony with all nations will continue to be used, the experience of the world and our own experience admonish us of the insecurity of trusting too confidently to their success. We can not, without committing a dangerous imprudence, abandon those measures of self-protection which are adapted to our situation and to which, notwithstanding our pacific policy, the violence and injustice of others may again compel us to resort. While our vast extent of seacoast, the commercial and agricultural habits of our people, the great capital they will continue to trust

¹Richardson, *Messages*, vol. 1, p. 296.²*Ibid.*, p. 305.

on the ocean, suggest the system of defense which will be most beneficial to ourselves, our distance from Europe and our resources for maritime strength will enable us to employ it with effect. Seasonable and systematic arrangements, so far as our resources will justify, for a navy adapted to defensive war, and which may in case of necessity be quickly brought into use, seem to be as much recommended by a wise and true economy as by a just regard for our future tranquillity, for the safety of our shores, and for the protection of our property committed to the ocean.

The present Navy of the United States, called suddenly into existence by a great national exigency, has raised us in our own esteem, and by the protection afforded to our commerce has effected to the extent of our expectations the objects for which it was created.

Address of the House of Representatives to John Adams, President of the United States¹

JOHN ADAMS,

President of the United States:

The Constitution of the United States having confided the management of our foreign negotiations to the control of the Executive power, we cheerfully submit to its decisions on this important subject; and in respect to the negotiations now pending with France we sincerely hope that the final result may prove as fortunate to our country as the most ardent mind can wish.

So long as a predatory war is carried on against our commerce we should sacrifice the interests and disappoint the expectations of our constituents should we for a moment relax that system of maritime defense which has resulted in such beneficial effects. At this period it is confidently believed that few persons can be found within the United States who do not admit that a navy, well organized, must constitute the natural and efficient defense of this country against all foreign hostility.

NOVEMBER 26, 1800.

¹Richardson, Messages, vol. 1, p. 310.

Reply of the President¹

WASHINGTON, November 27, 1800.

Mr. Speaker and Gentlemen of the House of Representatives:

With you, gentlemen, I sincerely hope that the final result of the negotiations now pending with France may prove as fortunate to our country as they have been commenced with sincerity and prosecuted with deliberation and caution. With you I cordially agree that so long as a predatory war is carried on against our commerce we should sacrifice the interests and disappoint the expectations of our constituents should we for a moment relax that system of maritime defense which has resulted in such beneficial effects. With you I confidently believe that few persons can be found within the United States who do not admit that a navy, well organized, must constitute the natural and efficient defense of this country against all foreign hostility.

JOHN ADAMS.

¹Richardson, *Messages*, vol. 1, p. 312.

Acts of Congress

CHAP. XLVIII.—*An Act more effectually to protect the Commerce and Coasts of the United States.*¹

WHEREAS armed vessels sailing under authority or pretense of authority from the Republic of France, have committed depredations on the commerce of the United States, and have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations, and treaties between the United States and the French nation. Therefore:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the President of the United States, and he is hereby authorized to instruct and direct the commanders of the armed vessels belonging to the United States to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to citizens thereof;—and also to retake any ship or vessel, of any citizen or citizens of the United States which may have been captured by any such armed vessel.

APPROVED, May 28, 1798.

CHAP. LIII.—*An Act to suspend the commercial intercourse between the United States and France, and the dependencies thereof.*²

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no ship or vessel, owned, hired, or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom after the first day of July next, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere under the ac-

¹Statutes at Large, vol. I, p. 561.

²*Ibid.*, p. 565.

knowledge of government of France, or shall be employed in any traffic or commerce with, or for any person resident within the jurisdiction, or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel together with her cargo shall be forfeited, and shall accrue, the one half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned in any circuit or district court of the United States which shall be holden within or for the district where the seizure shall be made.

SEC. 2. *And be it further enacted*, That after the first day of July next, no clearance for a foreign voyage shall be granted to any ship or vessel, owned, hired, or employed, wholly or in part, by any person resident within the United States, until a bond shall be given to the use of the United States, wherein the owner or employer, if usually resident or present, where the clearance shall be required, and otherwise his agent or factor, and the master or captain of such ship or vessel for the intended voyage, shall be parties, in a sum equal to the value of the ship or vessel, and her cargo, and shall find sufficient surety or sureties, to the amount of one half the value thereof, with condition that the same shall not, during her intended voyage or before her return within the United States, proceed, or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by distress of weather, or want of provisions, or by actual force and violence, to be fully proved and manifested before the acquittance of such bond; and that such vessel is not, and shall not be employed during her intended voyage, or before her return, as aforesaid, in any traffic or commerce with or for any person resident within the territory of that republic, or in any of the dependencies thereof.

SEC. 3. *And be it further enacted*, That from and after due notice of the passing of this act, no French ship or vessel, armed or unarmed, commissioned by or for, or under the authority of the French Republic, or owned, fitted, hired or employed by any person resident within the

territory of that republic, or any of the dependencies thereof, or sailing or coming therefrom, excepting any vessel to which the President of the United States shall grant a passport, which he is hereby authorized to grant in all cases where it shall be requisite for the purposes of any political or national intercourse, shall be allowed an entry, or to remain within the territory of the United States, unless driven there by distress of weather, or in want of provisions. And if contrary to the intent hereof any such ship or vessel shall be found within the jurisdictional limits of the United States, not being liable to seizure for any other cause, the company having charge thereof shall be required to depart and carry away the same, avoiding all unnecessary delay; and if they shall, notwithstanding, remain, it shall be the duty of the collector of the district, wherein, or nearest to which, such ship or vessel shall be, to seize and detain the same, at the expense of the United States: Provided, that ships or vessels which shall be *bona fide* the property of, or hired, or employed by citizens of the United States, shall be excepted from this prohibition until the first day of December next, and no longer: And provided that in the case of vessels hereby prohibited, which shall be driven by distress of weather, or the want of provisions into any port or place of the United States, they may be suffered to remain under the custody of the collector there, or nearest thereto, until suitable repairs or supplies can be obtained, and as soon as may be thereafter shall be required and suffered to depart: but no part of the lading of such vessel shall be taken out or disposed of, unless by the special permit of such collector, or to defray the unavoidable expense of such repairs or supplies.

SEC. 4. *And be it further enacted*, That this act shall continue and be in force until the end of the next session of Congress, and no longer.

SEC. 5. *Provided, and be it further enacted*, That if, before the next session of Congress, the government of France, and all persons acting by or under their authority, shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities which have been, and are by them encouraged and maintained against the vessels and other property of the citizens of the United States, and against their national rights and sovereignty, in violation of the faith of treaties, and the laws of nations, and shall thereby acknowledge the just claims of the United States to be considered as in all respects neutral, and unconnected in the present European war, if the same

shall be continued, then and thereupon it shall be lawful for the President of the United States, being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted and declared; and he shall be, and is hereby authorized to make proclamation thereof accordingly: Provided, that nothing in this act contained, shall extend to any ship or vessel to which the President of the United States shall grant a permission to enter or clear; which permission he is hereby authorized to grant to vessels which shall be solely employed in any purpose of political or national intercourse, or to aid the departure of any French persons, with their goods and effects, who shall have been resident within the United States, when he may think it requisite.

APPROVED, June 13, 1798.

CHAP. LX.—*An Act to authorize the defence of the Merchant Vessels of the United States against French depredations.*¹

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the commander and crew of any merchant vessel of the United States, owned wholly by a citizen or citizens thereof, may oppose and defend against any search, restraint or seizure, which shall be attempted upon such vessel, or upon any other vessel, owned, as aforesaid, by the commander or crew of any armed vessel sailing under French colours, or acting, or pretending to act, by, or under the authority of the French republic; and may repel by force any assault or hostility which shall be made or committed, on the part of such French, or pretended French vessel, pursuing such attempt, and may subdue and capture the same; and may also retake any vessel owned, as aforesaid, which may have been captured by any vessel sailing under French colours, or acting, or pretending to act, by or under authority from the French republic.

SEC. 2. *And be it further enacted,* That whenever the commander and crew of any merchant vessel of the United States shall subdue and capture any French, or pretended French armed vessel, from which an assault or other hostility shall be first made, as aforesaid, such armed vessel with her tackle, appurtenances, ammunition and lading, shall accrue, the one half to the owner or owners of such

¹Statutes at Large, vol. I, p. 572.

merchant vessel of the United States, and the other half to the captors: And being brought into any port of the United States, shall and may be adjudged and condemned to their use, after due process and trial, in any court of the United States, having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof, accordingly, and at their discretion; saving any agreement, which shall be between the owner or owners, and the commander and crew of such merchant vessel. In all cases of recapture of vessels belonging to citizens of the United States, by any armed merchant vessel, aforesaid, the said vessels, with their cargoes, shall be adjudged to be restored, and shall, by decree of such courts as have jurisdiction, in the premises, be restored to the former owner or owners, he or they paying for salvage, not less than one eighth, nor more than one half of the true value of the said vessels and cargoes, at the discretion of the court; which payments shall be made without any deduction whatsoever.

SEC. 3. *And be it further enacted*, That after notice of this act, at the several custom-houses, no armed merchant vessel of the United States shall receive a clearance or permit, or shall be suffered to depart therefrom, unless the owner or owners, and the master or commander of such vessel for the intended voyage, shall give bond, to the use of the United States, in a sum equal to double the value of such vessel, with condition, that such vessel shall not make or commit any depredation, outrage, unlawful assault, or unprovoked violence upon the high seas, against the vessel of any nation in amity with the United States; and that the guns, arms and ammunition of such vessel shall be returned within the United States, or otherwise accounted for, and shall not be sold or disposed of in any foreign port or place; and that such owner or owners, and the commander and crew of such merchant vessel shall, in all things, observe and perform such further instructions in the premises, as the President of the United States shall establish and order, for the better government of the armed merchant vessels of the United States.

SEC. 4. *And be it further enacted*, That the President of the United States shall be, and he is hereby authorized to establish and order suitable instructions to, and for, the armed merchant vessels of the United States, for the better governing and restraining the commanders and crews who shall be employed therein, and to prevent any out-

rage, cruelty or injury which they may be disposed to commit; a copy of which instructions shall be delivered by the collector of the customs to the commander of such vessel, when he shall give bond, as aforesaid. And it shall be the duty of the owner or owners, and commander and crew, for the time being, of such armed merchant vessel of the United States, at each return to any port of the United States, to make report to the collector thereof of any rencounter which shall have happened with any foreign vessel, and of the state of the company and crew of any vessel which they shall have subdued or captured; and the persons of such crew or company shall be delivered to the care of such collector, who, with the aid of the marshal of the same district, or the nearest military officer of the United States, or of the civil or military officers of any state, shall take suitable care for the restraint, preservation and comfort of such persons, at the expense of the United States, until the pleasure of the President of the United States shall be known concerning them.

SEC. 5. *And be it further enacted*, That this act shall continue and be in force for the term of one year, and until the end of the next session of Congress thereafter.

SEC. 6. *Provided, and be it further enacted*, That whenever the government of France, and all persons acting by, or under their authority, shall disavow, and shall cause the commanders and crews of all armed French vessels to refrain from the lawless depredations and outrages hitherto encouraged and authorized by that government against the merchant vessel[s] of the United States, and shall cause the laws of nations to be observed by the said armed French vessels, the President of the United States shall be, and he is hereby authorized to instruct the commanders and crews of the merchant vessels of the United States to submit to any regular search by the commanders or crews of French vessels, and to refrain from any force or capture to be exercised by virtue hereof.

APPROVED, June 25, 1798.

CHAP. LXII.—*An Act in addition to the act more effectually to protect the Commerce and Coasts of the United States.*¹

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all

¹Statutes at Large, vol. I, p. 574.

such armed vessels as may be seized, taken and brought into any port of the United States, in pursuance of the act, entitled "An act more effectually to protect the commerce and coasts of the United States," with the apparel, guns and appurtenances of such vessels, and the goods and effects, which shall be found on board the same, shall be liable to forfeiture and condemnation, and may be libelled and proceeded against in the district courts of the United States, for the district into which the same may be brought: *Provided*, that such forfeiture shall not extend to any goods or effects, the property of any citizen or person resident within the United States, and which shall have been before taken by the crew of such captured vessel.

SEC. 2. *And be it further enacted*, That whenever any vessel the property of, or employed by any citizen of the United States, or person resident therein, or any goods or effects belonging to any such citizen or resident shall be re-captured by any public armed vessel of the United States, the same shall be restored to the former owner or owners, upon due proof, he or they paying and allowing, as and for salvage to the recaptors, one eighth part of the value of such vessel, goods and effects, free of all deductions and expenses.

SEC. 3. *And be it further enacted*, That whenever any armed vessel, captured and condemned, as aforesaid, shall have been of superior or equal force to the public armed vessel of the United States by which such capture shall have been made, the forfeiture shall be and accrue wholly to the captors: and in other cases, one half thereof shall be to the use of the United States, and the residue to the captors. And all salvage which shall be allowed and recovered upon any vessel, goods or effects re-captured, and to be restored, as aforesaid, shall belong wholly to the officers and crew of the public armed vessel of the United States by which such re-capture shall be made: and the court before whom any condemnation shall be had, as aforesaid, shall and may order the sale of the vessel, goods and effects condemned, to be made at public auction, upon due notice by the marshal of the district in which the same shall be: and all expenses of condemnation and sale, being deducted from the proceeds, the part thereof which shall accrue to the United States, shall be paid into the public treasury, and the residue, and all allowances of salvage, as aforesaid, shall be distributed to, and among the officers and crews concerned therein, in the proportions which the President of the United States shall direct.

SEC. 4. *And be it further enacted*, That it shall be lawful for the President of the United States, to cause the officers and crews of the vessels so captured and hostile persons found on board any vessel, which shall be re-captured, as aforesaid, to be confined in any place of safety within the United States, in such manner as he may think the public interest may require, and all marshals and other officers of the United States are hereby required to execute such orders as the President may issue for the said purpose.

APPROVED, June 28, 1798.

CHAP. LXVI.—*An Act respecting Alien Enemies.*¹

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized, in any event, as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises and for the public safety: Provided, that aliens resident within the United States, who shall become liable as enemies, in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, dis-

¹Statutes at Large, vol. I, p. 577.

posal, and removal of their goods and effects, and for their departure, the full time which is, or shall be stipulated by any treaty, where any shall have been between the United States, and the hostile nation or government, of which they shall be natives, citizens, denizens or subjects: and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

SEC. 2. *And be it further enacted*, That after any proclamation shall be made as aforesaid, it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction, and of the several judges and justices of the courts of the United States, and they shall be, and are hereby respectively, authorized upon complaint, against any alien or alien enemies, as aforesaid, who shall be resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrained, conformably to the proclamation or regulations which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed.

SEC. 3. *And be it further enacted*, That it shall be the duty of the marshal of the district in which any alien enemy shall be apprehended, who by the President of the United States, or by order of any court, judge or justice, as aforesaid, shall be required to depart, and to be removed, as aforesaid, to provide therefor, and to execute such order, by himself or his deputy, or other discreet person or persons to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President of the United States, or of the court, judge or justice ordering the same, as the case may be.

APPROVED, July 6, 1798.

CHAP. LXVII.—*An Act to declare the treaties heretofore concluded with France, no longer obligatory on the United States.*¹

WHEREAS the treaties concluded between the United States and France have been repeatedly violated on the part of the French government; and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations, have been repelled with indignity: And whereas, under authority of the French government, there is yet pursued against the United States, a system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.

APPROVED, July 7, 1798.

CHAP. LXVIII.—*An Act further to protect the Commerce of the United States.*²

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States shall be, and he is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas, and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, being French property, shall be brought within some port of the United States, and shall be duly proceeded against and condemned as forfeited; and shall accrue and be distributed, as by law is or shall be provided respecting the captures which shall be made by the public armed vessels of the United States.

¹Statutes at Large, vol. I, p. 578.

²*Ibid.*, p. 578.

SEC. 2. *And be it further enacted*, That the President of the United States shall be, and he is hereby authorized to grant to the owners of private armed ships and vessels of the United States, who shall make application therefor, special commissions in the form which he shall direct, and under the seal of the United States; and such private armed vessels, when duly commissioned, as aforesaid, shall have the same license and authority for the subduing, seizing and capturing any armed French vessel, and for the recapture of the vessels, goods and effects of the people of the United States, as the public armed vessels of the United States may by law have; and shall be, in like manner, subject to such instructions as shall be ordered by the President of the United States, for the regulation of their conduct. And the commissions which shall be granted, as aforesaid, shall be revocable at the pleasure of the President of the United States.

SEC. 3. *Provided, and be it further enacted*, That every person intending to set forth and employ an armed vessel, and applying for a commission, as aforesaid, shall produce in writing the name, and a suitable description of the tonnage and force of the vessel, and the name and place of residence of each owner concerned therein, the number of the crew and the name of the commander, and the two officers next in rank, appointed for such vessel; which writing shall be signed by the person or persons making such application, and filed with the Secretary of State, or shall be delivered to any other officer or person who shall be employed to deliver out such commissions, to be by him transmitted to the Secretary of State.

SEC. 4. *And provided, and be it further enacted*, That before any commission, as aforesaid, shall be issued, the owner or owners of the ship or vessel for which the same shall be requested, and the commander thereof, for the time being, shall give bond to the United States, with at least two responsible sureties, not interested in such vessel, in the penal sum of seven thousand dollars; or if such vessel be provided with more than one hundred and fifty men, then in the penal sum of fourteen thousand dollars; with condition that the owners, and officers, and crews who shall be employed on board of such commissioned vessel, shall and will observe the treaties and laws of the United States, and the instructions which shall be given them for the regulation of their conduct: And will satisfy all damages and injuries which shall be done or committed contrary to the tenor thereof,

by such vessel, during her commission, and to deliver up the same when revoked by the President of the United States.

SEC. 5. *And be it further enacted*, That all armed French vessels, together with their apparel, guns and appurtenances, and any goods or effects which shall be found on board the same, being French property, and which shall be captured by any private armed vessel or vessels of the United States, duly commissioned, as aforesaid, shall be forfeited, and shall accrue to the owners thereof, and the officers and crews by whom such captures shall be made; and on due condemnation had, shall be distributed according to any agreement which shall be between them; or in failure of such agreement, then by the discretion of the court before whom such condemnation shall be.

SEC. 6. *And be it further enacted*, That all vessels, goods and effects, the property of any citizen of the United States, or person resident therein, which shall be recaptured, as aforesaid, shall be restored to the lawful owners, upon payment by them, respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of the United States having maritime jurisdiction according to the nature of each case: *Provided*, that such allowance shall not be less than one eighth, or exceeding one half of the full value of such recapture, without any deduction. And such salvage shall be distributed to and among the owners, officers and crews of the private armed vessel or vessels entitled thereto, according to any agreement which shall be between them; or in case of no agreement, then by the decree of the court who shall determine upon such salvage.

SEC. 7. *And be it further enacted*, That before breaking bulk of any vessel which shall be captured, as aforesaid, or other disposal or conversion thereof, or of any articles which shall be found on board the same, such capture shall be brought into some port of the United States, and shall be libelled and proceeded against before the district court of the same district; and if after a due course of proceedings, such capture shall be decreed as forfeited in the district court, or in the circuit court of the same district, in the case of any appeal duly allowed, the same shall be delivered to the owners and captors concerned therein, or shall be publicly sold by the marshal of the same court, as shall be finally decreed and ordered by the court. And the same court, who shall have final jurisdiction of any libel or complaint of any capture, as aforesaid, shall and may decree restitution,

in whole or in part, when the capture and restraint shall have been made without just cause, as aforesaid; and if made without probable cause, or otherwise unreasonably, may order and decree damages and costs to the party injured, and for which the owners, officers and crews of the private armed vessel or vessels by which such unjust capture shall have been made, and also such vessel or vessels shall be answerable and liable.

SEC. 8. *And be it further enacted*, That all French persons and others, who shall be found acting on board any French armed vessel, which shall be captured, or on board of any vessel of the United States, which shall be recaptured, as aforesaid, shall be reported to the collector of the port in which they shall first arrive, and shall be delivered to the custody of the marshal, or of some civil or military officer of the United States, or of any state in or near such port; who shall take charge for their safe keeping and support, at the expense of the United States.

APPROVED, July 9, 1798.

CHAP. X.—*An Act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof.*¹

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all commercial intercourse between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof, shall be, and from and after the second day of March next, is hereby prohibited and farther suspended, excepting only in the cases hereinafter provided. And any ship or vessel, owned, hired, or employed wholly or in part by any person or persons resident within the United States, or any citizen or citizens thereof resident elsewhere, and sailing therefrom after that day, which contrary to the intent hereof, shall be voluntarily carried, or shall be destined or permitted to proceed, or shall be sold, bartered, entrusted or transferred, for the purpose that she may proceed, whether directly or from any intermediate port or place, to any port or place within the territories of that Republic, or any of the dependencies thereof; or

¹Statutes at Large, vol. II, p. 7.

shall be engaged in any traffic or commerce, by or for any person resident within the territories of that Republic, or within any of the dependencies thereof; and also any cargo which shall be found on board of such ship or vessel, when detected and interrupted in such unlawful purpose, or at her return from such voyage to the United States, shall be wholly forfeited, and may be seized and condemned in any court of the United States, having competent jurisdiction.

SEC. 2. *And be it further enacted*, That excepting for foreign ships or vessels owned, hired, and employed by persons permanently residing in Europe, and commanded and wholly navigated by foreigners, no clearance for a foreign voyage shall be granted to any ship or vessel whatever, until the owner or the employer for the voyage, or if not resident within the district where the clearance shall be required, his factor or agent, with the master and one or more sufficient surety or sureties, to the satisfaction of the collector of the district, shall give bond to the United States, such owner, employer, or factor, with the master, in a sum equal to the value of the vessel, and of one-third of her cargo; and such surety or sureties in a like sum, when it shall not exceed ten thousand dollars; and if it shall exceed, then in that sum, with condition that the ship or vessel for which a clearance shall be required, is actually destined, and shall proceed to some port or place without the limits or jurisdiction of the French Republic, or any of the dependencies thereof, and during the intended voyage shall not be voluntarily carried, or permitted to proceed or sold, entrusted or transferred, with the purpose that she may proceed whether directly, or from any intermediate port or place, to any port or place within the territories of that Republic, or any of the dependencies thereof; and shall not, at any such port or place, voluntarily deliver or unlade any part of such cargo; and if compelled by distress of weather, or taken by force into any such port or place, will not there receive on board of such ship or vessel any goods, produce, or merchandise, other than necessary sea stores; and generally, that such ship or vessel shall not be employed in any traffic or commerce with or for any person resident within the territory of the French Republic, or any of the dependencies thereof.

SEC. 3. *Provided, and be it further enacted*, That when any ship or vessel which shall obtain a clearance for a foreign voyage, after a bond shall be given as aforesaid, shall be compelled by distress of

weather, or other casualty endangering the safety of such ship or vessel, or of the mariners on board the same, or shall be taken by any armed vessel, or other superior force, into any port or place within the territories of the French Republic, or any of the dependencies thereof, and shall there necessarily unlade and deliver, or shall be deprived of any cargo then on board, then, and in such case, the master or other person having charge of such ship or vessel, may receive compensation or payment in bills of exchange, or in money or bullion, for such cargo, but not otherwise, and shall not be understood thereby to contravene this law, or to incur a forfeiture of the said bond.

SEC. 4. *And be it further enacted*, That no ship or vessel coming from any port or place within the territories of the French Republic, or any of the dependencies thereof, whether with or without a cargo, or from any other port or place, with a cargo on board obtained for, or laden on board of such vessel at any port or place within the said territories or dependencies, which shall arrive within the limits of the United States after the said second day of March next, shall be admitted to an entry with the collector of any district; and each and every such ship or vessel which shall arrive as aforesaid, having on board any goods, wares or merchandise, destined to be delivered within the United States, contrary to the intent of this act, or which shall have otherwise contravened the same, together with the cargo which shall be found on board, shall be forfeited, and may be seized and condemned in any court of the United States having competent jurisdiction: *Provided*, that nothing herein contained shall be construed to prohibit the entry of any vessel having a passport granted under the authority of the French Republic, and solely employed for purposes of political or national intercourse with the government of the United States, and not in any commercial intercourse, and which shall be received, and permitted by the President of the United States to remain within the same: *And provided also*, that until the first day of August next, and no longer, any ship or vessel, wholly owned or employed by a foreigner, other than any person resident in France, or in any of the dependencies of the French Republic, and which coming therefrom shall be destined to the United States, and shall arrive within the same, not having otherwise contravened this act, shall be required and permitted to depart therefrom, and in case she shall accordingly depart, without any unreasonable delay, and without delivery, or at-

tempting to deliver, any cargo or lading within the United States, such ship or vessel, or any cargo which may be on board the same, shall not be liable to the forfeiture aforesaid.

SEC. 5. *And be it further enacted*, That if any ship or vessel, coming from any port or place within the territories of the French Republic, or any of the dependencies thereof, or with any cargo there obtained on board, but not destined to any port or place within the United States, shall be compelled by distress of weather, or other necessity, to put into any port or place within the limits of the United States, such ship or vessel shall be there hospitably received in the manner prescribed by the act, intituled "An act to regulate the collection of duties on imports and tonnage"; and shall be permitted to make such repairs, and to obtain such supplies as shall be necessary to enable her to proceed according to her destination; and such repairs and supplies being obtained, shall be thereafter required and permitted to depart. But if such ship or vessel shall not conform to the regulations prescribed by the act last mentioned, or shall unlade any part of her cargo, or shall take on board any cargo or supplies whatever, without the permit of the collector of the district previously obtained therefor, or shall refuse, or unreasonably delay to depart from and out of the United States, after having received a written notice to depart, which such collector may, and shall give, as soon as such ship or vessel shall be fit for sea; or having departed shall return to the United States, not being compelled thereto by further distress or necessity, in each and every such case, such ship or vessel and her cargo shall be forfeited and may be seized, and condemned in any court of the United States having competent jurisdiction.

SEC. 6 *And be it further enacted*, That at any time after the passing of this act, it shall be lawful for the President of the United States, by his order to remit and discontinue for the time being, whenever he shall deem it expedient, and for the interest of the United States, all or any of the restraints and prohibitions imposed by this act, in respect to the territories of the French Republic, or to any island, port or place belonging to the said Republic, with which in his opinion a commercial intercourse may be safely renewed; and also it shall be lawful for the President of the United States, whenever he shall afterwards deem it expedient, to revoke such order, and hereby to re-establish such restraints and prohibitions. And the President of the

United States shall be, and he is hereby authorized, to make proclamation thereof accordingly.

SEC. 7. *And be it further enacted*, That the whole of the island of Hispaniola shall for the purposes of this act be considered as a dependency of the French Republic: *Provided*, that nothing herein contained shall be deemed to repeal or annul in any part, the order or proclamation of the President of the United States, heretofore issued for permitting commercial intercourse with certain ports of that island.

SEC. 8. *And be it further enacted*, That it shall be lawful for the President of the United States, to give instructions to the public armed vessels of the United States, to stop and examine any ship or vessel of the United States on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to this act, and if upon examination, it shall appear that such ship or vessel is bound or sailing to, or from any port or place, contrary to the true intent and meaning of this act, it shall be the duty of the commander of such public armed vessel, to seize every ship or vessel engaged in such illicit commerce, and send the same to the nearest convenient port of the United States, to be there prosecuted in due course of law, and held liable to the penalties and forfeitures provided by this act.

SEC. 9. *And be it further enacted*, That all penalties and forfeitures incurred by force of this act, shall, and may be examined, mitigated and remitted in like manner, and under the like conditions, regulations and restrictions, as are prescribed, authorized and directed by the act, intituled "An act to provide for mitigating, or remitting, the forfeitures, penalties and disabilities accruing in certain cases therein mentioned"; and all penalties and forfeitures, which may be recovered in pursuance of this act in consequence of any seizure made by the commander of any public armed vessel of the United States, shall be distributed according to the rules prescribed by the act, intituled "An act for the government of the navy of the United States"; and all other penalties arising under this act, and which may be recovered, shall be distributed and accounted for in the manner prescribed by the act, intituled "An act to regulate the collection of duties on imports and tonnage."

SEC. 10. *And be it further enacted*, That nothing contained in this act shall extend to any ship or vessel to which the President of the

United States shall grant a permission to enter and clear ; provided such ship or vessel shall be solely employed, pursuant to such permission, for purposes of national intercourse ; and shall not be permitted to proceed with, or to bring to the United States any cargo or lading whatever other than necessary sea-stores.

SEC. 11. *And be it further enacted*, That the act, intituled "An act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof," shall be, and is hereby continued and shall be taken to be in force in respect to all offences, which shall have been committed against the same, before the expiration thereof ; and to the intent that all seizures, forfeitures and penalties arising upon such offences, may be had, sued for, prosecuted and recovered, any limitation of the said act to the contrary hereof notwithstanding.

SEC. 12. *And be it further enacted*, That this act shall be and remain in force until the third day of March, one thousand eight hundred and one: *Provided, however*, the expiration thereof shall not prevent or defeat any seizure, or prosecution for a forfeiture incurred under this act, and during the continuance thereof.

APPROVED, February 27, 1800.

CHAP. XXVII.—*An Act to continue in force the act intituled "An act to authorize the defence of the merchant vessels of the United States against French depredations."*¹

Bt it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act passed on the twenty-fifth day of June, one thousand seven hundred and ninety-eight, intituled "An act to authorize the defence of the merchant vessels of the United States against French depredations," excepting such parts of the said act as relate to salvage in cases of recapture, shall continue and be in force for and during the term of one year, and from thence to the end of the next session of Congress thereafter, and no longer.

APPROVED, April 22, 1800.

¹Statutes at Large, vol. II, p. 39.

Proclamations

Proclamation of June 26, 1799¹

BY THE PRESIDENT OF THE UNITED STATES OF
AMERICA

A PROCLAMATION

Whereas by an act of the Congress of the United States passed the 9th day of February last, entitled "An act further to suspend the commercial intercourse between the United States and France and the dependencies thereof," it is provided that at any time after the passing of this act it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interests of the United States, by his order to remit and discontinue for the time being the restraints and prohibitions by the said act imposed; either with respect to the French Republic or to any island, port, or place belonging to the said Republic with which a commercial intercourse may safely be renewed, and also to revoke such order whenever, in his opinion, the interest of the United States shall require; and he is authorized to make proclamation thereof accordingly; and

Whereas the arrangements which have been made at St. Domingo for the safety of the commerce of the United States and for the admission of American vessels into certain ports of that island do, in my opinion, render it expedient and for the interest of the United States to renew a commercial intercourse with such ports:

Therefore I, John Adams, President of the United States, by virtue of the powers vested in me by the above-recited act, do hereby remit and discontinue the restraints and prohibitions therein contained within the limits and under the regulations here following, to wit:

1. It shall be lawful for vessels which have departed or may depart from the United States to enter the ports of Cape François and Port Republicain, formerly called Port-au-Prince, in the said island of St. Domingo, on and after the 1st day of August next.

2. No vessel shall be cleared for any other port in St. Domingo than Cape François and Port Republicain.

¹Richardson, Messages, vol. I, p. 288.

3. It shall be lawful for vessels which shall enter the said ports of Cape François and Port Republicain after the 31st day of July next to depart from thence to any other port in said island between Monte Christi on the north and Petit Goave on the west; provided it be done with the consent of the Government of St. Domingo and pursuant to certificates or passports expressing such consent, signed by the consul-general of the United States or consul residing at the port of departure.

4. All vessels sailing in contravention of these regulations will be out of the protection of the United States and be, moreover, liable to capture, seizure, and confiscation.

Given under my hand and the seal of the United States, at Philadelphia, the 26th day of June, A. D. 1799, and of the Independence of the said States the twenty-third.

(Seal.)

JOHN ADAMS.

By the President:

TIMOTHY PICKERING,
Secretary of State.

Proclamation of May 9, 1800¹

PROCLAMATION

MAY 9, 1800.

Whereas by an act of Congress of the United States passed the 27th day of February last, entitled "An act further to suspend the commercial intercourse between the United States and France and the dependencies thereof," it is enacted that at any time after the passing of the said act it shall be lawful for the President of the United States, by his order, to remit and discontinue for the time being, whenever he shall deem it expedient and for the interest of the United States, all or any of the restraints and prohibitions imposed by the said act in respect to the territories of the French Republic, or to any island, port, or place belonging to the said Republic with which, in his opinion, a commercial intercourse may be safely renewed, and to make proclamation thereof accordingly; and it is also thereby further enacted that the whole of the island of Hispaniola shall, for the purposes of the said act, be considered as a dependence of the French Republic; and

¹Richardson, Messages, vol. I, p. 302.

Whereas the circumstances of certain ports and places of the said island not comprised in the proclamation of the 26th day of June, 1799, are such that I deem it expedient and for the interest of the United States to remit and discontinue the restraints and prohibitions imposed by the said act in respect to those ports and places in order that a commercial intercourse with the same may be renewed:

Therefore I, John Adams, President of the United States, by virtue of the powers vested in me as aforesaid, do hereby remit and discontinue the restraints and prohibitions imposed by the act aforesaid in respect to all the ports and places in the said island of Hispaniola from Monte Christi on the north, round by the eastern end thereof as far as the port of Jacmel on the south, inclusively. And it shall henceforth be lawful for vessels of the United States to enter and trade at any of the said ports and places, provided it be done with the consent of the Government of St. Domingo. And for this purpose it is hereby required that such vessels first enter the port of Cape François or Port Republicain, in the said island, and there obtain the passports of the said Government, which shall also be signed by the consul-general or consul of the United States residing at Cape François or Port Republicain, permitting such vessel to go thence to the other ports and places of the said island hereinbefore mentioned and described. Of all which the collectors of the customs and all other officers and citizens of the United States are to take due notice and govern themselves.

In testimony, etc.

JOHN ADAMS.

Proclamation of September 6, 1800¹

BY JOHN ADAMS, PRESIDENT OF THE UNITED STATES
OF AMERICA

A PROCLAMATION

Whereas by an act of the Congress of the United States passed on the 27th day of February last, entitled "An act further to suspend the commercial intercourse between the United States and France and the dependencies thereof," it is enacted "that at any time after the passing of the said act it shall be lawful for the President of the United

States, by his order, to remit and discontinue for the time being, whenever he shall deem it expedient and for the interest of the United States, all or any of the restraints and prohibitions imposed by the said act in respect to the territories of the French Republic, or to any island, port, or place belonging to said Republic with which, in his opinion, a commercial intercourse may be safely renewed, and to make proclamation thereof accordingly;" and it is also thereby further enacted that the whole of the island of Hispaniola shall, for the purposes of the said act, be considered as a dependence of the French Republic; and

Whereas the circumstances of the said island are such that, in my opinion, a commercial intercourse may safely be renewed with every part thereof, under the limitations and restrictions hereinafter mentioned:

Therefore I, John Adams, President of the United States, by virtue of the powers vested in me as aforesaid, do hereby remit and discontinue the restraints and prohibitions imposed by the act aforesaid in respect to every part of the said island, so that it shall be lawful for vessels of the United States to trade at any of the ports and places thereof, provided it be done with the consent of the Government of St. Domingo; and for this purpose it is hereby required that such vessels first clear for and enter the port of Cape François or Port Republicain, in the said island, and there obtain the passports of the said Government, which shall also be signed by the consul-general of the United States, or their consul residing at Cape François, or their consul residing at Port Republicain, permitting such vessels to go thence to the other ports and places of the said island. Of all which the collectors of the customs and all other officers and citizens of the United States are to take due notice and govern themselves accordingly.

Given under my hand and the seal of the United States of America, at the city of Washington, this 6th day of September, A. D. 1800, and of the Independence of the said States the twenty-fifth.

(Seal.)

JOHN ADAMS.

By the President:

J. MARSHALL,

Secretary of State.

¹Richardson, Messages, vol. I, p. 304.

APPENDIX

CONVENTION OF PEACE, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND FRANCE¹

*Concluded September 30, 1800; ratifications exchanged at Paris, July
31, 1801; proclaimed December 21, 1801*

The Premier Consul of the French Republic in the name of the people of France, and the President of the United States of America, equally desirous to terminate the differences which have arisen between the two States, have respectfully appointed their Plenipotentiaries, and given them full power to treat upon those differences, and to terminate the same; that is to say, the Premier Consul of the French Republic, in the name of the people of France, has appointed for the Plenipotentiaries of the said Republic the citizens Joseph Bonaparte, ex-Ambassador at Rome and Counsellor of State; Charles Pierre Claret Fleurieu, Member of the National Institute and of the Board of Longitude of France and Counsellor of State, President of the Section of Marine; and Pierre Louis Rœderer, Member of the National Institute of France and Counsellor of State, President of the Section of the Interior; and the President of the United States of America, by and with the advice and consent of the Senate of the said States, has appointed for their Plenipotentiaries, Oliver Ellsworth, Chief Justice of the United States; William Richardson Davie, late Governor of the State of North Carolina; and William Vans Murray, Minister Resident of the United States at The Hague; who, after having exchanged their full powers, and after full and mature discussion of the respective interests, have agreed on the following articles:

ARTICLE I

There shall be a firm, inviolable, and universal peace, and a true and sincere friendship between the French Republic and the United States of America, and between their respective countries, territories, cities, towns, and people, without exception of persons or places.

ARTICLE II

The Ministers Plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the

¹Malloy, Treaties, etc., vol. 1, p. 496.

convention of 14th of November, 1788, nor upon the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and convention shall have no operation, and the relations of the two countries shall be regulated as follows:

ARTICLE III

The public ships which have been taken on one part and the other, or which may be taken before the exchange of ratifications, shall be restored.

ARTICLE IV

Property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted), shall be mutually restored on the following proofs of ownership, viz: The proof on both sides with respect to merchant ships, whether armed or unarmed, shall be a passport in the form following:

"To all who shall see these presents, greeting:

"It is hereby made known that leave and permission has been given to _____, master and commander of the ship called _____, of the town of _____, burthen _____ tons, or thereabouts, lying at present in the port and haven of _____, and bound for _____, and laden with _____; after that his ship has been visited, and before sailing, he shall make oath before the officers who have the jurisdiction of maritime affairs, that the said ship belongs to one or more of the subjects of _____, the act whereof shall be put at the end of these presents, as likewise that he will keep, and cause to be kept, by his crew on board, the marine ordinances and regulations, and enter in the proper office a list, signed and witnessed, containing the names and surnames, the places of birth and abode of the crew of his ship, and of all who shall embark on board her, whom he shall not take on board without the knowledge and permission of the officers of the marine; and in every port or haven where he shall enter with his ship, he shall shew this present leave to the officers and judges of the marine, and shall give a faithful account to them of what passed and was done during his voyage; and he shall carry the colours, arms, and ensigns of the [French Republic or the United States] during his voyage. In witness whereof we have signed these presents, and put the seal of our arms thereunto, and caused the same to be countersigned by _____ at _____ the _____ day of _____ anno Domini."

And this passport will be sufficient without any other paper, any ordinance to the contrary notwithstanding; which passport shall not be deemed requisite to have been renewed or recalled, whatever num-

ber of voyages the said ship may have made, unless she shall have returned home within the space of a year. Proof with respect to the cargo shall be certificates, containing the several particulars of the cargo, the place whence the ship sailed and whither she is bound, so that the forbidden and contraband goods may be distinguished by the certificates; which certificates shall have been made out by the officers of the place whence the ship set sail, in the accustomed form of the country. And if such passport or certificates, or both, shall have been destroyed by accident or taken away by force, their deficiency may be supplied by such other proofs of ownership as are admissible by the general usage of nations. Proof with respect to other than merchant ships shall be the commission they bear.

This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for.

ARTICLE V

The debts contracted by one of the two nations with individuals of the other, or by the individuals of one with the individuals of the other, shall be paid, or the payment may be prosecuted, in the same manner as if there had been no misunderstanding between the two States. But this clause shall not extend to indemnities claimed on account of captures or confiscations.

ARTICLE VI

Commerce between the parties shall be free. The vessels of the two nations and their privateers, as well as their prizes, shall be treated in their respective ports as those of the nation the most favoured; and, in general, the two parties shall enjoy in the ports of each other, in regard to commerce and navigation, the privileges of the most favoured nation.

ARTICLE VII

The citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation, or otherwise, of their goods, moveable and immoveable, holden in the territory of the French Republic in Europe, and the citizens of the French Republic shall have the same liberty with regard to goods, moveable and immoveable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries who shall be heirs of goods, moveable or immoveable, in the other, shall be able to succeed ab intestato, without being obliged to obtain letters of naturalization, and without having the effect of

this provision contested or impeded, under any pretext whatever; and the said heirs, whether such by particular title, or ab intestato, shall be exempt from any duty whatever in both countries. It is agreed that this article shall in no manner derogate from the laws which either State may now have in force, or hereafter may enact, to prevent emigration; and also that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be, and the other nation shall be at liberty to enact similar laws.

ARTICLE VIII

To favor commerce on both sides it is agreed that, in case a war should break out between the two nations, which God forbid, the term of six months after the declaration of war shall be allowed to the merchants and other citizens and inhabitants respectively, on one side and the other, during which time they shall be at liberty to withdraw themselves, with their effects and moveables, which they shall be at liberty to carry, send away, or sell, as they please, without the least obstruction; nor shall their effects, much less their persons, be seized during such term of six months; on the contrary, passports, which shall be valid for a time necessary for their return, shall be given to them for their vessels and the effects which they shall be willing to send away or carry with them; and such passports shall be a safe conduct against all insults and prizes which privateers may attempt against their persons and effects. And if anything be taken from them, or any injury done to them or their effects, by one of the parties, their citizens or inhabitants, within the term above prescribed, full satisfaction shall be made to them on that account.

ARTICLE IX

Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies, which they may have in public funds, or in the public or private banks, shall ever, in any event of war or of national difference, be sequestered or confiscated.

ARTICLE X

It shall be free for the two contracting parties to appoint commercial agents for the protection of trade, to reside in France and the United States. Either party may except such place as may be thought proper from the residence of those agents. Before any agent shall exercise his functions, he shall be accepted in the usual forms by the party to whom he is sent; and when he shall have been accepted and furnished with his exequatur, he shall enjoy the rights and prerogatives of the similar agents of the most favoured nations.

ARTICLE XI

The citizens of the French Republic shall pay in the ports, havens, roads, countries, islands, cities, and towns of the United States, no other or greater duties or imposts, of what nature soever they may be, or by what name soever called, than those which the nation most favoured are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing from one port in the said State to another, or in going to and from the same from and to any part of the world, which the said nations do or shall enjoy. And the citizens of the United States shall reciprocally enjoy, in the territories of the French Republic in Europe, the same privileges and immunities, as well for their property and persons as for what concerns trade, navigation, and commerce.

ARTICLE XII

It shall be lawful for the citizens of either country to sail with their ships and merchandise (contraband goods always excepted) from any port whatever to any port of the enemy of the other, and to sail and trade with their ships and merchandise, with perfect security and liberty, from the countries, ports, and places of those who are enemies of both, or of either party, without any opposition or disturbance whatsoever, and to pass not only directly from the places and ports of the enemy aforementioned to neutral ports and places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same Power or under the several, unless such ports or places shall be actually blockaded, besieged, or invested.

And whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor any part of her cargo, if not contraband, be confiscated, unless, after notice of such blockade or investment, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper. Nor shall any vessel of either that may have entered into such port or place before the same was actually besieged, blockaded, or invested by the other, be restrained from quitting such place with her cargo, nor if found therein after the reduction and surrender of such place shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof.

ARTICLE XIII

In order to regulate what shall be deemed contraband of war, there shall be comprised, under that denomination, gun-powder, saltpetre,

petards, match, ball, bombs, grenades, carcasses, pikes, halberts, swords, belts, pistols, holsters, cavalry-saddles and furniture, cannon, mortars, their carriages and beds, and generally all kinds of arms, ammunition of war, and instruments fit for the use of troops; all the above articles, whenever they are destined to the port of an enemy, are hereby declared to be contraband, and just objects of confiscation; but the vessel in which they are laden, and the residue of the cargo, shall be considered free, and not in any manner infected by the prohibited goods, whether belonging to the same or a different owner.

ARTICLE XIV

It is hereby stipulated that free ships shall give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the citizens of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either, contraband goods being always excepted. It is also agreed, in like manner, that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemy.

ARTICLE XV

On the contrary, it is agreed that whatever shall be found to be laden by the citizens of either party on any ship belonging to the enemies of the other, or their citizens, shall be confiscated without distinction of goods, contraband or not contraband, in the same manner as if it belonged to the enemy, except such goods and merchandizes as were put on board such ship before the declaration of war, or even after such declaration, if so be it were done without knowledge of such declaration; so that the goods of the citizens of either party, whether they be of the nature of such as are prohibited, or otherwise, which, as is aforesaid, were put on board any ship belonging to an enemy before the war, or after the declaration of the same, without the knowledge of it, shall no ways be liable to confiscation, but shall well and truly be restored without delay to the proprietors demanding the same; but so as that if the said merchandizes be contraband, it shall not be any ways lawful to carry them afterwards to any ports belonging to the enemy. The two contracting parties agree that the term of two months being passed after the declaration of war, their respective citizens, from whatever part of the world they come, shall not plead the ignorance mentioned in this article.

ARTICLE XVI

The merchant ships belonging to the citizens of either of the contracting parties, which shall be bound to a port of the enemy of one of the parties, and concerning whose voyage and the articles of their cargo there shall be just grounds of suspicion, shall be obliged to exhibit, as well upon the high seas as in the ports or roads, not only their passports, but likewise their certificates, showing that their goods are not of the quality of those which are specified to be contraband in the thirteenth article of the present convention.

ARTICLE XVII

And that captures on light suspicions may be avoided, and injuries thence arising prevented, it is agreed that when one party shall be engaged in war, and the other party be neuter, the ships of the neutral party shall be furnished with passports similar to that described in the fourth article, that it may appear thereby that the ships really belong to the citizens of the neutral party; they shall be valid for any number of voyages, but shall be renewed every year; that is, if the ship happens to return home in the space of a year. If the ships are laden, they shall be provided not only with the passports above mentioned, but also with certificates similar to those described in the same article, so that it may be known whether they carry any contraband goods. No other paper shall be required, any usage or ordinance to the contrary notwithstanding. And if it shall not appear from the said certificates that there are contraband goods on board, the ships shall be permitted to proceed on their voyage. If it shall appear from the certificates that there are contraband goods on board any such ship, and the commander of the same shall offer to deliver them up, the offer shall be accepted, and the ship shall be at liberty to pursue its voyage, unless the quantity of contraband goods be greater than can conveniently be received on board the ship of war or privateer, in which case the ship may be carried into port for the delivery of the same.

If any ship shall not be furnished with such passport or certificates as are above required for the same, such case may be examined by a proper judge or tribunal, and if it shall appear from other documents or proofs admissible by the usage of nations, that the ship belongs to the citizens of the neutral party, it shall not be confiscated, but shall be released with her cargo (contraband goods excepted) and be permitted to proceed on her voyage.

If the master of a ship named in the passport should happen to die, or be removed by any other cause, and another put in his place, the ship and cargo shall nevertheless be equally secure, and the passport remain in full force.

ARTICLE XVIII

If the ships of the citizens of either of the parties shall be met with, either sailing along the coasts or on the high seas, by any ship of war or privateer of the other, for the avoiding of any disorder the said ships of war or privateers shall remain out of cannon-shot, and may send their boats on board the merchant ship which they shall so meet with, and may enter her to the number of two or three men only, to whom the master or commander of such ship shall exhibit his passport concerning the property of the ship, made out according to the form prescribed in the fourth article. And it is expressly agreed that the neutral party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other examination whatever.

ARTICLE XIX

It is expressly agreed by the contracting parties that the stipulations above mentioned, relative to the conduct to be observed on the sea by the cruisers of the belligerent party towards the ships of the neutral party, shall be applied only to ships sailing without convoy; and when the said ships shall be convoyed, it being the intention of the parties to observe all the regard due to the protection of the flag displayed by public ships, it shall not be lawful to visit them; but the verbal declaration of the commander of the convoy, that the ships he convoys belong to the nation whose flag he carries, and that they have no contraband goods on board, shall be considered by the respective cruisers as fully sufficient, the two parties reciprocally engaging not to admit, under the protection of their convoys, ships which shall carry contraband goods destined to an enemy.

ARTICLE XX

In all cases where vessels shall be captured or detained, under pretence of carrying to the enemy contraband goods, the captor shall give a receipt for such of the papers of the vessel as he shall retain, which receipt shall be annexed to a descriptive list of the said papers; and it shall be unlawful to break up or open the hatches, chests, trunks, casks, bales, or vessels found on board, or remove the smallest part of the goods, unless the lading be brought on shore in presence of the competent officers, and an inventory be made by them of the said goods; nor shall it be lawful to sell, exchange, or alienate the same in any manner, unless there shall have been lawful process, and the competent judge or judges shall have pronounced against such goods sentence of confiscation, saving always the ship and the other goods which it contains.

ARTICLE XXI

And that proper care may be taken of the vessel and cargo, and embezzlement prevented, it is agreed that it shall not be lawful to remove the master, commander, or supercargo of any captured ship from on board thereof, either during the time the ship may be at sea after her capture, or pending the proceedings against her or her cargo, or anything relative thereto. And in all cases where a vessel of the citizens of either party shall be captured or seized, and held for adjudication, her officers, passengers, and crew shall be hospitably treated. They shall not be imprisoned or deprived of any part of their wearing apparel, nor of the possession and use of their money, not exceeding for the captain, supercargo, and mate five hundred dollars each, and for the sailors and passengers one hundred dollars each.

ARTICLE XXII

It is further agreed that in all cases the established courts for prize causes, in the country to which the prizes may be conducted, shall alone take cognizance of them. And whenever such tribunal of either of the parties shall pronounce judgment against any vessel or goods, or property claimed by the citizens of the other party, the sentence or decree shall mention the reasons or motives on which the same shall have been founded, and an authenticated copy of the sentence or decree, and of all the proceedings in the case, shall, if demanded, be delivered to the commander or agent of the said vessel, without any delay, he paying the legal fees for the same.

ARTICLE XXIII

And that more abundant care may be taken for the security of the respective citizens of the contracting parties, and to prevent their suffering injuries by the men-of-war or privateers of either party, all commanders of ships of war and privateers, and all others the said citizens, shall forbear doing any damage to those of the other party, or committing any outrage against them, and if they act to the contrary they shall be punished, and shall also be bound in their persons and estates to make satisfaction and reparation for all damages and the interest thereof, of whatever nature the said damages may be.

For this cause all commanders of privateers, before they receive their commissions, shall hereafter be obliged to give, before a competent judge, sufficient security by at least two responsible sureties who have no interest in the said privateer, each of whom, together with the said commander, shall be jointly and severally bound in the sum of seven thousand dollars or thirty-six thousand eight hundred and twenty francs, or if such ships be provided with above one hundred and fifty seamen or soldiers, in the sum of fourteen thousand

dollars, or seventy-three thousand six hundred and forty francs, to satisfy all damages and injuries which the said privateer, or her officers, or men, or any of them, may do or commit during their cruise, contrary to the tenor of this convention, or to the laws and instructions for regulating their conduct; and further, that in all cases of aggression the said commission shall be revoked and annulled.

ARTICLE XXIV

When the ships of war of the two contracting parties, or those belonging to their citizens which are armed in war, shall be admitted to enter with their prizes the ports of either of the two parties, the said public or private ships, as well as their prizes, shall not be obliged to pay any duty either to the officers of the place, the judges, or any others; nor shall such prizes, when they come to and enter the ports of either party, be arrested or seized, nor shall the officers of the place make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart, and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to shew. It is always understood that the stipulations of this article shall not extend beyond the privileges of the most favored nation.

ARTICLE XXV

It shall not be lawful for any foreign privateers who have commissions from any Prince or State in enmity with either nation, to fit their ships in the ports of either nation, to sell their prizes, or in any manner to exchange them; neither shall they be allowed to purchase provisions, except such as shall be necessary for their going to the next port of that Prince or State from which they have received their commissions.

ARTICLE XXVI

It is further agreed that both the said contracting parties shall not only refuse to receive any pirates into any of their ports, havens, or towns, or permit any of their inhabitants to receive, protect, harbor, conceal, or assist them in any manner, but will bring to condign punishment all such inhabitants as shall be guilty of such acts or offenses.

And all their ships, with the goods or merchandises, taken by them and brought into the port of either of the said parties, shall be seized as far as they can be discovered, and shall be restored to the owners, or their factors or agents duly authorized by them (proper evidence being first given before competent judges for proving the property;) even in case such effects should have passed into other hands by sale, if it be proved that the buyers knew or had good reason to believe or suspect that they had been piratically taken.

ARTICLE XXVII

Neither party will intermeddle in the fisheries of the other on its coasts, nor disturb the other in the exercise of the rights which it now holds or may acquire on the coast of Newfoundland, in the Gulph of St. Lawrence, or elsewhere on the American coast northward of the United States. But the whale and seal fisheries shall be free to both in every quarter of the world.

This convention shall be ratified on both sides in due form, and the ratifications exchanged in the space of six months, or sooner, if possible.

In faith whereof the respective Plenipotentiaries have signed the above articles both in the French and English languages, and they have thereto affixed their seals: declaring, nevertheless, that the signing in the two languages shall not be brought into precedent, nor in any way operate to the prejudice of either party.

Done at Paris the eighth day of Vendémiaire of the ninth year of the French Republic, the thirtieth day of September, anno Domini eighteen hundred.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

J. BONAPARTE.
C. P. FLEURIEU.
ROEDERER.
O. ELLSWORTH.
W. R. DAVIE.
W. V. MURRAY.

NOTE:—The Senate of the United States did, by their resolution of the 3d day of February, 1801, consent to and advise the ratification of the convention: *Provided*, The second article be expunged, and that the following article be added or inserted: "It is agreed that the present convention shall be in force for the term of eight years from the time of the exchange of the ratifications."

Bonaparte, First Consul, in the name of the French people, consented on the 31st July, 1801, "to accept, ratify, and confirm the above convention, with the addition importing that the convention shall be in force for the space of eight years, and with the retrenchment of the second article: *Provided*, That by this retrenchment the two States renounce the respective pretensions, which are the object of the said article."

These ratifications having been exchanged at Paris on the 31st of July, 1801, were again submitted to the Senate of the United States, which on the 19th of December, 1801, declared the convention fully ratified, and returned it to the President for promulgation. (Malloy, p. 505.)

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DIVISION OF INTERNATIONAL LAW

Pamphlet No. 25

OPINIONS OF THE ATTORNEYS GENERAL AND JUDGMENTS OF THE SUPREME COURT AND COURT OF CLAIMS OF THE UNITED STATES RELATING TO THE CONTROVERSY OVER NEUTRAL RIGHTS BETWEEN THE UNITED STATES AND FRANCE, 1797-1800

PUBLISHED BY THE ENDOWMENT
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Prefatory Note

In the pamphlet entitled "Documents Relating to the Controversy over Neutral Rights between the United States and France, 1797-1800," the messages of President Adams, the replies of the Congress and the texts of the various laws enacted to protect the neutral rights of the United States against French aggression were given. The present pamphlet continues the subject of its predecessor by bringing together opinions of the attorneys general and decisions of the Supreme Court of the United States and of the Court of Claims regarding the origin, nature, extent and legal effect of the hostilities between the United States and France at the close of the eighteenth century.

In President Wilson's address to the Congress on February 26, 1917, he said:

Since it has unhappily proved impossible to safeguard our neutral rights by diplomatic means against the unwarranted infringements they are suffering at the hands of Germany, there may be no recourse but to *armed* neutrality, which we shall know how to maintain and for which there is abundant American precedent.

These two pamphlets, which will later be combined into one volume, have been prepared and issued as a contribution to American precedent, which the President considers abundant.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.
February 28, 1917.

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OPINIONS OF THE ATTORNEYS GENERAL AND JUDGMENTS OF THE
SUPREME COURT AND COURT OF CLAIMS OF THE UNITED
STATES RELATING TO THE CONTROVERSY OVER NEUTRAL
RIGHTS BETWEEN THE UNITED STATES AND FRANCE, 1797-1800

Opinions of the Attorneys General of the United States

TREASON¹

It is treason for a citizen or other person not commissioned, within the United States, to abet France during a maritime war with her.

BUCK TAVERN, *August 21, 1798.*

SIR: Having taken into consideration the acts of the French Republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations. Consequently, France is our enemy; and to aid, assist, and abet that nation in her maritime warfare, will be treason in a citizen or any other person within the United States not commissioned under France. But in a French subject, commissioned by France, acting openly according to his commission, such assistance will be hostility. The former may be tried and punished according to our laws; the latter must be treated according to the laws of war.

I have thought it my duty to make this communication in consequence of the information you received from Rhode Island, of the intentions of a Frenchman, whose name I do not now call to mind, who is said to be somewhere in this country, on the business of buying ships and supplies of a military kind, for the West Indies. He should be apprehended and tried as a traitor, unless he has a commission, and acts according to it; in which case he should be treated as an enemy, and confined as a prisoner of war.

I have the honor, etc., etc.,

CHARLES LEE.

To the Secretary of State.

¹Opinions of Attorneys General, vol. i, page 84.

PRIZE SHIP AND CREW—HOW TO BE DISPOSED OF¹

If the prize be a pirate, the officers and crew are to be prosecuted in the circuit court of the United States, without respect to the nation to which each individual may belong.

If it be regularly commissioned as a ship-of-war, the officers and crew are to be detained as prisoners, except such as are citizens of the United States.

Citizens of the United States who aid a nation with whom we are at war on the high seas, against the United States, are guilty of treason.

Offenders against the United States may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in a State, but can be tried only before the court of the United States having cognizance of the offense.

Proceedings against the ship and cargo are to be had before the district court of the United States, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

ALEXANDRIA, *September 20, 1798.*

SIR: I take the liberty of writing to you on an interesting subject, concerning which you will perhaps hear from the Secretary of State.

According to the account given in the Norfolk paper of the 15th, it seems probable that the ship *Nigre*; prize to the *Constitution*, will be found to be a pirate. If, after due inquiry (which you are requested to make, and for that purpose to go to Norfolk), it shall appear to be the case, the officers and crew, and all others on board having any agency in the ship, are to be prosecuted (witnesses excepted) in the circuit court of the United States for the district of Virginia, according to the laws of the United States, without respect to the nation to which each individual may belong, whether he be British, French, American, or of any other nation.

On the other hand, if the ship is regularly commissioned and authorized by France as a public or private ship of war, all the officers and crew are to be detained as prisoners, at the expense of the United States—except such as are citizens of the United States, or of some one of them, who may be tried for treason in adhering to, and aiding, the enemies of the United States. After mature consideration of the decrees of France, and of the laws of the United States, and the conduct of each nation to the other, it is my opinion that the two nations are in a state of maritime war; and, consequently, that the citizens of the United States who aid and adhere to France in acts of hostility on the high sea, against the United States and their fellow-citizens, are

¹Opinions of Attorneys General, vol. i, page 85.

guilty of treason. Perhaps this opinion may be found erroneous; if so, such citizens, if acquitted of treason, may be indicted for felony, under the ninth section of the act passed 30th April, 1790, entitled "An act for the punishment of certain crimes against the United States."

I conceive the law of Virginia, which requires the examination before a county or corporation court, of criminals triable in the State courts, does not apply to criminals triable before the courts of the United States in the Virginia district. Upon this point, reference may be had to the 23d section of the 20th chapter of the acts of Congress of 1789. By this section, an offender against the United States is, agreeably to the usual mode of process against offenders in such State where he is found, to be arrested and imprisoned, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offense. The *arrest* is to be agreeably to the usual mode of process in the State; the *imprisonment* or *bailment* is also to be agreeably to the usual mode of process in the State; but the *trial* is to be only before the court of the United States having cognizance of the offense. The examination preparatory to the trial is to be before a magistrate, who is to send to the clerk's office of the court, copies of the process and the recognizance of the witnesses, for their appearance to testify. To admit a different construction of this section, would be to admit a different mode of *trial* of the same offense against the United States, in their courts, as it might happen to be cognizable in one district or in another; for the examination before a county or corporation court, according to the law of Virginia, is a species of trial that gives a chance of acquittal unknown in other States. Besides, the text of the Virginia law seems to be confined to offenders amenable to the courts of the State.

Against the ship and cargo, proceedings are to be had before the *district* court of the United States in Virginia, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes.

It will afford me satisfaction to receive from you a statement of facts relative to this ship, and your ideas on the matters of law which have been the subject of these remarks.

I am, etc., etc.,

CHARLES LEFF.

TO THOMAS NELSON, ESQ.,

District Attorney, U. S., Yorktown, Virginia.

Judgments of the Supreme Court of the United States

TALBOT v. THE SHIP *AMELIA*, SEEMAN, CLAIMANT¹

Salvage

The officers and crew of a ship of war are entitled to salvage, for the recapture of an armed neutral vessel, from a foreign belligerent, by whom she had been manned with a prize crew.

ERROR from the Circuit Court of New York. It appeared on the record, that Captain Talbot, of the frigate *Constitution*, having recaptured the *Amelia*, an armed Hamburg vessel, which had been captured by a French national corvette, and ordered to St. Domingo for adjudication, brought her into the port of New York. A libel was, thereupon, filed in the district court, by the recaptor, setting forth the facts, and praying that the vessel and cargo might be condemned as prize; or that such other decree might be pronounced as the court should deem just and proper.

A claim was filed by H. F. Seeman, for Chapeau Rouge & Co., of Hamburg, the owners, insisting that the property had not been changed by the capture, and praying restitution, with damages and costs. The District Judge, Hobart, decreed one-half of the gross amount of sales of ship and cargo, without deduction (a sale having been made by consent), to be paid to the recaptors, in the proportions directed by the act of Congress for the government of the navy; and the other half, deducting all costs and charges, to be paid to the claimants.

The cause was brought by appeal before the circuit court, WASHINGTON, Justice, presiding, who reversed the decree of the district court, so far as it ordered payment of one-half of the gross sales to the recaptors, "considering that, as the nation to which the owners of the said ship and cargo belong, is in amity with the French Republic, the ship and cargo could not, consistently with the laws of nations, be condemned by the French, as a lawful prize; and that, therefore, no service was rendered by the *Constitution*, or by the commander, officers or crew thereof, by the recapture aforesaid;" and affirmed the rest of the

¹⁴ Dallas, 34. Same case, second hearing, 1 Cranch, 1.

decree. On the decree of the circuit court, the present writ of error with instituted; and the following statement of facts made a part of the record by consent:

The following case is agreed upon by the parties, to be annexed to the writ of error in this cause, viz.: The ship *Amelia* sailed from Calcutta, in Bengal, in the month of April, 1799, loaded with a cargo of the produce and manufacture of that country, consisting of cotton, sugars and dry goods in bales, bound to Hamburg. On the 6th of September, in the same year, the same was captured, whilst in the pursuit of her said voyage, by the French national corvette *La Diligente*, L. I. Dubois, commander, who took out her captain and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war. On the 15th of the same month of September, the United States ship of war, the *Constitution*, commanded by Silas Talbot, Esquire, the libellant, fell in with, and recaptured the *Amelia*, she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette. At the time of the recapture, the *Amelia* had eight iron cannon mounted, and eight wooden guns, with which she had left Calcutta, as before stated. From such of the ship's papers as were found on board, and the testimony in the cause, the ship *Amelia*, and her cargo, appear to have been the property of Chapeau Rouge, a citizen of Hamburg, residing and carrying on commerce in that place. It is conceded, that the Republic of France and the city of Hamburg are not in a state of hostility to each other, and that Hamburg is to be considered as neutral between the present belligerent powers. The *Amelia* and her cargo, having been sent by Captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return.

ALEXANDER HAMILTON, of counsel for plaintiff in error.

B. LIVINGSTON, of counsel for defendant in error.

The cause was argued, on the 11th, 12th and 13th of August, 1800, by *Ingersoll* and *Lewis*, for the plaintiff in error; and by *M. Levy* and *Dallas*, for the defendant in error. The general points of the discussion were these:

1st. Whether the *Amelia* could be considered, at the time of the recapture, as a French armed vessel, within the meaning of the act of

Congress, which authorizes the seizure of French armed vessels? (1 U. S. Stat. 572.)

2d. Whether Captain Talbot was authorized to make a recapture, the *Amelia* belonging to a power, equally in amity with the United States, and with France?

3. Whether on positive statute, or general principles, a salvage was due to the recaptors, for rescuing the *Amelia* from the French?

On the 18th of August, PATERSON, Justice, stated, that it was the wish of the court to postpone the cause, for further argument, before a fuller bench. It was accordingly, argued again, at Washington, in August term, 1801, by *Ingersoll* and *Bayard* (of Delaware), for the plaintiff in error; and by *M. Levy*, *J. T. Mason* (of Maryland) and *Dallas*, for the defendant in error. And MARSHALL, Chief Justice, delivered the judgment of the court, "that the decree of the circuit court was correct, in reversing the decree of the district court, but not correct in decreeing the restoration of the *Amelia*, without paying salvage. This court, therefore, is of opinion, that the decree, so far as the restoration of the *Amelia* without salvage is ordered, ought to be reversed: and that the *Amelia* and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the net value, after deducting therefrom the charges which have been incurred."¹

BAS v. TINGY, (*THE ELIZA*)²

State of war.—Salvage

Every contention, by force, between two nations, in external matters, under authority of their respective governments, is a *public* war.

If a general war be declared, its extent and operations are only restricted and regulated by the *jus belli*, forming part of the law of nations; but if a *partial* war be waged, its extent and operation depend on our municipal laws. CHASE, J.

A belligerent power has a right, by the laws of nations, to search a neutral vessel; and upon suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. *Ibid.*

¹A full report of the arguments, on the first hearing of this cause, was prepared; but they are found so ably incorporated with the arguments on the second hearing, in Mr. Cranch's Reports, that it has been thought unnecessary to publish it in this volume. 1 Cranch, 1. [Mr. Dallas's note.]

²4 Dallas, 37.

An American vessel, captured by a French privateer, on the 31st March, 1799, and recaptured by a public armed American ship, on the 21st of April, 1799, was condemned to pay salvage, under the act of Congress of the 2d March, 1799.

IN error from the Circuit Court for the district of Pennsylvania. On the return of the record, it appeared by a case stated, that the defendant in error had filed a libel in the district court, as commander of the public armed ship, the *Ganges*, for himself and others, against the ship *Eliza*, John Bas, master, her cargo, etc., in which he set forth that the said ship and cargo belonged to citizens of the United States; that they were taken on the high seas, by a French privateer, on the 31st of March, 1799; and that they were retaken by the libellant, on the 21st of April following, after having been above ninety-six hours in possession of the captors. The libel prayed for salvage, conformable to the acts of Congress; and the facts being admitted by the answer of the respondents, the district court decreed to the libellants one-half of the whole value of ship and cargo. This decree was affirmed in the circuit court, without argument, and by consent of the parties, in order to expedite a final decision on the present writ of error.

The controversy involved a consideration of the following sections in two acts of Congress: By an act of the 28th of June, 1798 (1 U. S. Stat. 574, § 2), it is declared, "That whenever any vessel the property of, or employed by, any citizen of the United States, or person resident therein, or any goods or effects belonging to any such citizen or resident, shall be recaptured by any public armed vessel of the United States, the same shall be restored to the former owner or owners, upon due proof, he or they paying and allowing, as and for salvage to the recaptors, one-eighth part of the value of such vessel, goods and effects, free from all deduction and expenses."

By an act of the 2d of March, 1799 (1 U. S. Stat. 716), it is declared, "That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken from the enemy within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, etc.; and if above ninety-six hours, one-half, all of which is to be paid, without any deduction whatsoever, etc. And by the 9th section of the same act, it is declared, "That all the money accruing, or which has already accrued from the sale of prizes, shall be and remain

forever a fund for the payment of the half-pay to the officers and seamen, who may be entitled to receive the same."

The case was argued by *Lewis* and *E. Tilghman*, for the plaintiff in error, and by *Rawle* and *W. Tilghman*, for the defendant; and the argument turned principally upon two inquiries: 1st. Whether the act of March, 1799, applied only to the event of a future general war? 2d. Whether France was an enemy of the United States, within the meaning of the law?

For the *plaintiff* in error, it was urged, that the acts, passed in immediate relation to France, were of a restricted temporary nature; but that the act of March, 1799, established a permanent system for the government of the navy; and the designation of "the enemy" in that act, applies only to future hostilities, in case of a declared war. That on the just principles of government, every citizen has a right to the public protection; and therefore, no salvage ought, in strictness, to be allowed for the recapture of the property of a citizen by a public ship of war. Vatt. lib. 2, c. 6, § 71. And Congress has manifested, in some degree, their sense on the subject, by making the salvage in that case less than in the case of recapture by a private armed vessel. That the word "enemy" must be construed according to its legal import (1 Str. 278); and that, according to legal interpretation, the differences between the United States and France do not constitute war, nor render the citizens of France enemies of the United States. Vatt. lib. 3, §§ 69, 70; 1 Black. Com. 257; 2 *ibid.* 259; 2 Burl. 258, § 31; 261, § 39; 262. That a subsequent law does not abrogate a prior law, unless it contains contradictory matter; and where there are no negative or repealing words, both must be so construed as to stand together. 11 Co. 61, 63; Show. 439; 10 Mod. 118; 6 Co. 19 *b.* That the act of March, 1799, contains no repealing or negative words; and may be applied, consistently, to the case of a future public war, leaving the qualified state of hostility with France, for the operation of the preceding law.

For the *defendant* in error, it was contended, that the relative situation of the United States and France, is that of "a qualified maritime war;" on the part of the French, aggressive; on our part, defensive; proceeding from a legitimate expression of the public will, through its constitutional organ, the congress, manifested by public declarations

and open acts. That from such a state, the character of enemy necessarily arises; and that the designation being so understood by congress, was intended to be applied, and was actually applied, to France. That the act of March, 1799, speaks of prizes, which could only be such as had been captured from France; and that taking the word prize, according to its legal signification, it means a capture, or acquisition by right of war, in a state of war. 3 Bl. Com. 69, 108; 2 Wood. 441; Doug. 585, 591; Rob. Adm. 283. That if a prize means a capture in war, it follows, of course, that it means a capture from an enemy; for war can only be waged against enemies. That war may exist, without a declaration; a defensive war requires no declaration; and an imperfect or qualified public war, is still distinct from the case of letters of marque and reprisal, for the redress of a private wrong, by the employment of a private force. 1 Ruth., lib. 1, c. 19, § 1, p. 470-1; 2 *ibid.* 497-8, 503, 507, 511; Burl. 196, 189; Vatt. 475; 2 Burl. 204, § 7; Lee on Capt. 13-39; Puff. 843; Grot., lib. 3, c. 3, § 6; Molloy, 46. That congress, by repealing the regulations respecting salvage, contained in the act of March, 1798, has virtually declared, that those regulations were in force, in relation to France; and that the provisions in the act of March, 1799, being inconsistent with the provision in the act of June, 1798, the elder law is so far repealed.¹

The judges delivered their opinions *seriatim* in the following manner:

MOORE, Justice.—This case depends on the construction of the act for the regulation of the navy. It is objected, indeed, that the act applies only to future wars; but its provisions are obviously applicable to the present situation of things, and there is nothing to prevent an immediate commencement of its operation.

It is, however, more particularly urged, that the word “enemy” can not be applied to the French; because the section in which it is used, is confined to such a state of war, as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war, it is said, does not exist between America and France. A number of books have been cited to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt

¹All the acts of Congress, passed in relation to France, were cited and discussed by both sides, in the course of the argument; but it is thought unnecessary to refer to them more particularly in this report.

whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask, by what other word, the idea of the relative situation of America and France could be communicated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise described, than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and surely, Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.

Nor does it follow, that the act of March, 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of recaptured property belonging to our own citizens, and in the event of a future war, it might also be applied to the case of recaptured property belonging to a nation in amity with the United States. But it is further to be remarked, that all the expressions of the act may be satisfied, even at this very time: for by former laws, the recapture of property, belonging to persons resident within the United States, is authorized; those residents may be aliens; and if they are subjects of a nation in amity with the United States, they answer completely the description of the law.

The only remaining objection, offered on behalf of the plaintiff in error, supposes, that, because there are no repealing or negative words, the last law must be confined to future cases, in order to have a subject for the first law to regulate. But if two laws are inconsistent (as, in my judgment, the laws in question are), the latter is a virtual repeal of the former, without any express declaration on the subject.

On these grounds, I am clearly of opinion, that the decree of the circuit court ought to be affirmed.

WASHINGTON, Justice.—It is admitted, on all hands, that the defendant in error is entitled to some compensation: but the plaintiff in error contends, that the compensation should be regulated by the act of the 28th June, 1798 (1 U. S. Stat. 574, § 2), which allows only one-eighth for salvage; while the defendant in error refers his claim to the act of the 2d March (*ibid.* 716, § 7), which makes an allowance of

one-half, upon a recapture from the enemy, after an adverse possession of ninety-six hours. If the defendant's claim is well founded, it follows, that the latter law must virtually have worked a repeal of the former; but this has been denied, for a variety of reasons:

1st. Because the former law relates to recaptures from the French, and the latter law relates to recaptures from the enemy; and it is said, that "the enemy" is not descriptive of France or of her armed vessels, according to the correct and technical understanding of the word.

The decision of this question must depend upon another; which is, whether, at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down, that every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities, such as in a solemn war, where the government restrain the general power.

Now, if this be the true definition of war, let us see, what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipped ships of war; and commissioned private armed ships; enjoining the former, and authorizing the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and

to recapture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an American and French armed vessel, combating on the high seas, with a view, the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorized by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

2d. But secondly, it is said, that a war of the imperfect kind, is more properly called acts of hostility or reprisal, and that Congress did not mean to consider the hostility subsisting between France and the United States, as constituting a state of war. In support of this position, it has been observed, that in no law, prior to March, 1799, is France styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because, as to France, she was sufficiently described by the title of the French Republic; and as to America, the degree of hostility meant to be carried on, was sufficiently described, without declaring war, or declaring that we were at war. Such a declaration by Congress, might have constituted a perfect state of war, which was not intended by the government.

3d. It has likewise been said, that the 7th section of the act of March, 1799, embraces cases which, according to preexisting laws, could not then take place, because no authority had been given to recapture friendly vessels from the French; and this argument was strongly and forcibly pressed. But because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest, whenever they should arise. It is a permanent law, embracing a variety of subjects, not made in relation to the present war with France only, but in relation to any future war with her, or with any other nation. It might then very properly allow salvage for recapturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends: and whenever such a war should exist between the United States and France, or any other nation, as, according to the law of nations, or special authority, would justify the recapture of friendly vessels, it might, on that event, with similar propriety, apply to them, which furnishes, I think, the true construction of the act. The opinion which I delivered at New York,

in *Talbot v. Seeman*, was, that although an American vessel could not justify the retaking of a neutral vessel from the French, because neither the sort of war that subsisted, nor the special commission under which the American acted, authorized the proceeding; yet, that the 7th section of the act of 1799, applied to recaptures from France, as an enemy, in all cases authorized by Congress. And on both points, my opinion remains unshaken; or rather has been confirmed by the very able discussion which the subject has lately undergone in this court, on the appeal from my decree.

Another reason has been assigned by the defendant's counsel, why the former law is not to be regarded as repealed by the latter, to wit, that a subsequent affirmative general law can not repeal a former affirmative special law, if both may stand together. This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws, since the censure only applies where the contradiction appears in the same law; and it does not follow, that a provision which is proper at one time, may not be improper at another, when circumstances are changed: but the ground of argument is, that a change ought not to be presumed. Yet, if there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it. What, then, is the evidence of legislative will? In fact and in law, we are at war: an American vessel, fighting with a French vessel, to subdue and make her prize, is fighting with an enemy, accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of prizes, which can only be of property taken at sea from an enemy, *jure belli*; and the ninth section speaks of prizes as taken from an enemy, in so many words, alluding to prizes which had been previously taken; but no prize could have been then taken except from France: prizes taken from France were, therefore, taken from the enemy. This then, is a legislative interpretation of the word enemy; and if the enemy, as to prizes, surely they preserve the same character as to recaptures.

Besides, it may be fairly asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn or general? And it must be recollected, that the occasion of making the law of March, 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property retaken was placed;

a circumstance for which the former salvage law had not provided. The two laws, upon the whole, can not be rendered consistent, unless the court could wink so hard as not to see and know, that in fact, in the view of Congress, and to every intent and purpose, the possession by a French armed vessel of an American vessel, was the possession of an enemy: and therefore, in my opinion, the decree of the circuit court ought to be affirmed.

CHASE, Justice.—The judges agreeing unanimously in their opinion, I presumed, that the sense of the court would have been delivered by the president and therefore, I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons which induce me to concur in affirming the decree of the circuit court.

An American public vessel of war recaptures an American merchant vessel from a French privateer, after ninety-six hours possession, and the question is stated, what salvage ought to be allowed? There are two laws on the subject: by the first of which, only one-eighth of the value of the recaptured property is allowed; but by the second, the recaptor is entitled to a moiety. The recapture happened after the passing of the latter law; and the whole controversy turns on the single question, whether France was, at that time, an enemy? If France was an enemy, then the law obliges us to decree one-half of the value of the ship and cargo for salvage: but if France was not an enemy, then no more than one-eighth can be allowed.

The decree of the circuit court (in which I presided) passed by consent; but although I never gave an opinion, I have never entertained a doubt on the subject. Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial war. Congress has not declared war, in general terms; but Congress has authorized hostilities on the high seas, by certain persons, in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed

vessels, lying in a French port; and the authority is not given indiscriminately to every citizen of America, against every citizen of France, but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but nevertheless, it is a public war, on account of the public authority from which it emanates.

There are four acts, authorized by our government, that are demonstrative of a state of war. A belligerent power has a right, by the law of nations, to search a neutral vessel; and upon suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of Congress, an American vessel is authorized: 1st. To resist the search of a French public vessel: 2d. To capture any vessel that should attempt, by force, to compel submission to a search: 3d. To recapture any American vessel, seized by a French vessel: and 4th. To capture any French armed vessel, wherever found, on the high seas. This suspension of the law of nations, this right of capture and recapture, can only be authorized by an act of the government, which is, in itself, an act of hostility. But still, it is a restrained or limited hostility; and there are, undoubtedly, many rights attached to a general war, which do not attach to this modification of the powers of defense and aggression. Hence, whether such shall be the denomination of the relative situation of America and France, has occasioned great controversy at the bar; and it appears, that Sir William Scott also was embarrassed in describing it, when he observed, "that in the present state of hostility (if so it may be called) between America and France," it is the practice of the English court of admiralty, to restore recaptured American property, on payment of a salvage. (*The Santa Cruz*, 1 Rob. 54.) But, for my part, I can not perceive the difficulty of the case. As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of "enemy" extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was, at the time of the capture, only a partial enemy; but still she was an enemy.

It has been urged, however, that Congress did not intend the provisions of the act of March, 1799, for the case of our subsisting quali-

fied hostility with France, but for the case of a future state of general war with any nation: I think, however, that the contrary appears from the terms of the law itself, and from the subsequent repeal. In the 9th section, it is said, that all the money accruing, "or which has already accrued from the sale of prizes," shall constitute a fund for the half-pay of officers and seamen. Now, at the time of making this appropriation, no prizes (which *ex vi termini* implies a capture in a state of war) had been taken from any nation but France, those which had been taken, were not taken from France as a friend; they must, consequently, have been taken from her as an enemy; and the retrospective provision of the law can only operate on such prizes. Besides, when the 13th section regulates "the bounty given by the United States on any national ship of war, taken from the enemy, and brought into port," it is obvious, that even if the bounty has no relation to previous captures, it must operate from the moment of passing the act, and embraces the case of a national ship of war, taken from France as an enemy, according to the existing qualified state of hostilities. But the repealing act, passed on the 3d of March, 1800 (subsequent to the recapture in the present case) ought to silence all doubt as to the intention of the legislature; for, if the act of March, 1799, did not apply to the French Republic, as an enemy, there could be no reason for altering or repealing that part of it, which regulates the rate of salvage on recaptures.

The acts of Congress have been analyzed, to show, that a war is not openly denounced against France, and that France is nowhere expressly called the enemy of America: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favor of the French Republic, Congress had an arduous task to perform, even in preparing for necessary defense and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the measures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been ripe for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented, that decisive event, which many thought would have best suited the interest, as well as the honor, of the United States. The progress of our contest with France, indeed, resembles much the progress of our revolutionary contest; in which, watching the current of public sentiment, the patriots of that day pro-

ceeded, step by step, from the supplicatory language of petitions for a redress of grievances, to the bold and noble declaration of national independence. Having, then, no hesitation in pronouncing that a partial war exists between America and France, and that France was an enemy, within the meaning of the act of March, 1799, my voice must be given for affirming the decree of the circuit court.

PATERSON, Justice.—As the case appears on the record, and has been accurately stated by the counsel, and by the judges who have delivered their opinions, it is not necessary to recapitulate the facts. My opinion shall be expressed in a few words. The United States and the French Republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country. It is a war *quoad hoc*. As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war, a war at sea, as to certain purposes. The national armed vessels of France attack and capture the national armed vessels of the United States; and the national armed vessels of the United States are expressly authorized and directed to attack, subdue and take the national armed vessels of France, and also to recapture American vessels. It is, therefore, a public war between the two nations, qualified on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term “enemy,” applies; it is the appropriate expression, to be limited in its signification, import and use, by the qualified nature and operation of the war on our part. The word enemy proceeds the full length of the war, and no further. Besides, the intention of the legislature as to the meaning of this word, enemy, is clearly deducible from the act for the government of the navy, passed the 2d of March, 1799. This act embraces the past, present and future, and contains passages which point the character of enemy at the French, in the most clear and irresistible manner. I shall select one paragraph, namely, that which refers to prizes taken by our public vessels, anterior to the passing of the latter act. The word prizes in this section can apply to the French, and the French only. This is decisive on the subject of legislative intention.

BY THE COURT.—Let the decree of the circuit court be affirmed.

TALBOT v. SEEMAN, (*THE AMELIA*)¹*Salvage.—Partial war.—Foreign laws*

Salvage allowed to the United States ship of war, for the recapture of a Hamburg vessel out of the hands of the French (France and Hamburg being neutral to each other), on the ground that she was in danger of condemnation under the French decree of the 18th January, 1798.

The United States and France, in the year 1799, were in a state of partial war. To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered.

Probable cause is sufficient to render the recapture lawful.

Where the amount of salvage is not regulated by statute, it must be determined by the principles of general law.

Marine ordinances of foreign countries, promulgated by the executive, by order of the legislature of the United States, may be read in the courts of the United States, without further authentication or proof.

Municipal laws of foreign countries are generally to be proved as facts.

This was a writ of error to reverse a decree of the Circuit Court, which reversed the decree of the District Court of New York, so far as it allowed salvage to the recaptors of the ship *Amelia* and her cargo.

The libel in the district court was filed November 5, 1799, by Captain Talbot, in behalf of himself and the other officers and crew of the United States ship of war the *Constitution*, against the ship *Amelia*, her tackle, furniture and cargo; and set forth—

1. That in pursuance of instructions from the President of the United States he subdued, seized, etc., on the high seas, the said ship *Amelia* and cargo, etc., and brought her into the port of New York.

2. That at the time of capture, she was armed with eight carriage-guns, and was under the command of citizen Etienne Prevost, a French officer of marine, and had on board, besides the commander, eleven French mariners. That the libellant had been informed, that she, being the property of some person to him unknown, sailed from Calcutta, an English port in the East Indies, bound for some port in Europe; that upon her said voyage she was met with and captured by a French national corvette, called *La Diligente*, commanded by L. J. Dubois, who took out of her the master and crew of the *Amelia*, with all the papers relating to her and her cargo, and placed the said Etienne Prevost, and the said French mariners, on board of her, and ordered her to St. Domingo for adjudication, as a good and lawful

¹ Cranch, 1.

prize; and that she remained in the full and peaceable possession of the French from the time of her capture, for the space of ten days, whereby, the libellant was advised, that, as well by the law of nations as by the particular laws of France, the said ship became, and was to be considered, as a French ship.

Whereupon, he prayed usual process, etc., and condemnation; or, in case restoration should be decreed, that it might be on payment of such salvage as by law ought to be paid for the same.

The claim and answer of Hans Frederic Seeman, in behalf of Messrs. Chapeau Rouge & Co., of Hamburg, owners of the ship *Amelia* and her cargo, stated, that the said ship, commanded by Jacob F. Engelbrecht, as master, sailed on the 20th of February, 1798, from Hamburg, on a voyage to the East Indies, where she arrived safe; that in April, 1799, she left Calcutta, bound to Hamburg; that during her voyage, and at the time of her capture by the French, she and her cargo belonged to Messrs. Chapeau Rouge & Co., citizens of Hamburg, and if restored, she will be wholly their property; that on the 6th of September, on her voyage home, she was captured on the high seas by a French armed vessel, commanded by citizen Dubois, who took out the master and thirteen of her crew, and all her papers, leaving on board the claimant, who was mate of the *Amelia*, the doctor and five other men. That the French commander put on board twelve hands, and ordered her to St. Domingo, and parted from her on the fifth day after her capture. That on the 15th of September, the *Amelia*, while in possession of the French, was captured, without any resistance on her part, by the said ship of war the *Constitution*, and brought into New York. That the *Amelia* had eight carriage guns, it being usual for all vessels, in the trade she was carrying on, to be armed, even in times of general peace. That there being peace between France and Hamburg, at the time of the first capture, and also between the United States and Hamburg, and between the United States and France, the possession of the *Amelia* by the French, in the manner, and for the time stated in the said libel, could, neither by the law of nations, nor by the laws of France, nor by those of the United States, change the property of the said ship *Amelia* and her cargo, or make the same liable to condemnation in a French court of admiralty; that the same could not, therefore, be considered as French property: wherefore, he prayed restoration in like plight as at the time of capture by the ship *Constitution*, with costs and charges.

On the 16th of December, 1799, the district judge, by consent of parties made an interlocutory decree, directing the marshal to sell the ship and cargo, and bring the money into court; and that the clerk should pay half of the amount of sales to the claimant, on his giving security to refund, in case the court should so decree; and that the clerk should retain the other half in his hands, together with all costs and charges, etc.

Afterwards, on the 25th of February, 1800, the judge of the district court (Hobart) made his final decree, directing half of the gross amount of sales of the ship and cargo, without any deduction whatever, to be paid to the libellant for the use of the officers and crew of the ship *Constitution*, to be distributed according to the act of Congress for the government of the navy of the United States. And that out of the other moiety, the clerk should pay the officers of the court, and the proctors for the libellant and claimant, their taxed costs and charges, and that the residue should be paid to the owners of the *Amelia*, or their agent. From this decree, the claimant appealed to the circuit court.

At the Circuit Court for the district of New York, in April, 1800, before Judge WASHINGTON and the district judge, the cause was argued by *B. Livingston* and *Burr* for the appellant, and *Harrison* and *Hamilton*, for the respondent; and on the 9th of April, 1800, the circuit court made the following decree, viz.:

That the decree of the district court, so far forth as it orders a payment, by the clerk, of a moiety of the gross amount of sales, to Silas Talbot, commander, etc., and to the officers and crew of the said ship *Constitution*, is erroneous, and so far forth, be reversed without costs; that is to say, the court considering the admission on the part of the respondent, that the papers brought here by Jacob Frederic Engelbrecht, master of the ship *Amelia*, prove her and her cargo to be Hamburg property, and also considering that as the nation to which the owners of the said ship and cargo belong, is in amity with the French Republic, the said ship and cargo could not, consistently with the laws of nations, be condemned by the French as a lawful prize, and that, therefore, no service was rendered by the United States ship of war the *Constitution*, or by the commander, officers or crew thereof, by the recapture aforesaid.

Whereupon, it is ordered, adjudged and decreed by the court, and it is hereby ordered, adjudged and decreed by the authority of the same, that the former part of the decree of the district

court, by which a moiety of the proceeds is allowed to the commander, officers and crew aforesaid, be and the same is hereby reversed. And the court further considering all the circumstances of the present case, arising from the capture and recapture stated in the libel and claim and answer, and that by the sale of the said ship *Amelia* and her cargo, made with the express consent of the appellant, the costs and charges in this cause have nearly all accrued, and that, therefore, the expenses should be defrayed out of the proceeds, thereupon, it is hereby further ordered, adjudged and decreed by the court, that so much of the said decree of the said district court as relates to the payment by the clerk, to the several officers of the court, and to the proctors of the libellant and claimant in this cause, of their taxed costs and charges, out of the other moiety of the said proceeds, and also of the residue of the said last-mentioned moiety, after deducting the costs and charges aforesaid, to the owner or owners of the said ship *Amelia* and her cargo, or to their legal representatives, be and the same is hereby affirmed.

To reverse this decree, the libellant sued out a writ of error to the Supreme Court, and by consent of parties, the following statement of facts was annexed to the record which came up:

The ship *Amelia* sailed from Calcutta, in Bengal, in the month of April, 1799, loaded with a cargo of the product and manufacture of that country, consisting of cotton, sugars and dry goods in bales, and was bound to Hamburg. On the 6th of September, in the same year, she was captured, while in the pursuit of her said voyage, by the French national corvette *La Diligente*, L. J. Dubois, commander, who took out her master and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war. On the 15th of the same month of September, the United States ship of war the *Constitution*, commanded by Silas Talbot, Esq., the libellant, fell in with and recaptured the *Amelia*, she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette.

At the time of the recapture, the *Amelia* had eight iron cannon mounted, and eight wooden guns; with which she left Calcutta, as before stated. From such of the ship's papers as were found on board, and the testimony in the cause, the ship *Amelia* and her cargo appear to have been the property of Chapeau Rouge, a citizen of Hamburg, residing and carrying on commerce in that place. It is conceded, that the Republic of France and the city of

Hamburg are not in a state of hostility to each other; and that Hamburg is to be considered as neutral between the present belligerent powers.

The *Amelia* and her cargo, having been sent by Captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return.

The cause now came on to be argued, at August term, 1801, by *Bayard* and *Ingersoll*, for the libellant, and *Dallas*, *Mason* and *Levy*, for the claimant.

For the *libellant*, three points were made. 1. That at the time, and under the circumstances, the ship *Amelia* was liable to capture by the law, and instructions to seize French armed vessels, for the purpose of being brought into port, and submitted to legal adjudication in the courts of the United States. 2. That Captain Talbot, by this capture, saved the ship *Amelia* from condemnation in a French court of admiralty. 3. That for this service, upon abstract principles of equity and justice, according to the law of nations, and the acts of Congress, the recaptors are entitled to a compensation for salvage.

I. Had Captain Talbot a right to seize the *Amelia*, and bring her into port for adjudication?

The acts of Congress on this subject ought all to be considered together and in one view. This is the general rule of construction, where several acts are made *in pari materia*. Plowd. 206; 1 Atk. 457, 458.

The first act authorizing captures of French vessels, is that of 28th May, 1798. (1 U. S. Stat. 561.) The preamble recites, that "whereas, armed vessels sailing under authority, or pretense of authority, from the Republic of France, have committed depredations on the commerce of the United States," etc., therefore it is enacted, that the President be authorized to instruct and direct the commanders of the armed vessels of the United States "to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations on the vessels belonging to citizens thereof; and also to retake any ship or vessel of any citizen

or citizens of the United States, which may have been captured by any such armed vessel."

The *Amelia* was "an armed vessel, sailing under authority from the Republic of France," and if she had committed, or had been found hovering on the coast, for the purpose of committing, depredations on the vessels of the citizens of the United States, she would have been clearly liable to capture under this act of Congress. This act is entitled "an act more effectually to protect the commerce and coasts of the United States;" and by it, the objects of capture are limited to "armed vessels, sailing under authority, or pretense of authority, from the Republic of France, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations," etc.

It was soon perceived, that a right of capture, so limited, would not afford, what the act contemplated, an effectual protection to the commerce of the United States. Congress, therefore, on the 9th July, 1798, at the same session, passed the "act further to protect the commerce of the United States" (1 U. S. Stat. 578), and thereby took off the restriction of the former act, which limited captures to vessels having actually committed depredation, or which were hovering on the coast for that purpose. This act authorizes the capture of any "armed French vessel, on the high seas," and if the *Amelia* was such an armed French vessel as is contemplated by this act, she was liable to capture, and it was the duty of Captain Talbot to take her and bring her into port.

Another act was passed at the same session, on the 25th June, 1798 (1 U. S. Stat. 572), entitled "an act to authorize the defense of the merchant vessels of the United States against French depredations," which, as it constitutes a part of that system of defense and opposition which the legislature had in view, ought to be taken into consideration. It enacts, that merchant vessels of citizens of the United States may oppose and defend against any search, restraint or seizure which shall be attempted "by the commander or crew of any armed vessel, sailing under French colors, or acting, or pretending to act, by or under the authority of the French Republic;" and in case of attack, may repel the same, and subdue and capture the vessel.

The court, in construing any one of these laws, will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature.

It is evident, by the title of the act of the 9th July, 1798, and by the general complexion of all the acts of that session upon the subject, that it was not the intention of Congress, by the act of July 9th, to restrict the cases of capture contemplated by the act of 28th May, but to enlarge them. The spirit of the people was roused; they demanded a more vigorous and a more effectual opposition to the aggressions of France, and the spirit of Congress rose with that of the people. It can not be supposed, that having, in May, used the expression, "armed vessels, sailing under authority, or pretense of authority, from the Republic of France," and in June the expression, "any armed vessel, sailing under French colors, or acting, or pretending to act, by or under the authority of the French Republic," they meant to restrict the cases of capture, in July, when they used the words "any armed French vessel." On the contrary, the confidence in the national opinion was increased, and further measures of defense were adopted, intending not to recede from anything done before, but to amplify the opposition. The act of July was in addition to, not in derogation from, the act of May. Congress evidently meant the same description of vessels, in each of those acts. "Armed vessels, sailing under authority, or pretense of authority, of France," and "armed vessels sailing under French colors, or acting, or pretending to act, under the authority of the French Republic," and "armed French vessels," must be understood to be the same.

If there is a difference, no reason can be given for it. A vessel, in the circumstances of the *Amelia*, was as capable of annoying our commerce, as if she had been owned by Frenchmen. Her force was at the command of France, and there can be no doubt, but she would have captured any unarmed American that might have fallen in her way. She was, therefore, one of the objects of that hostility which Congress had authorized. Congress have the power of declaring war: they may declare a general war or a partial war: so, it may be a general maritime war, or a partial maritime war.

This court, in the case of *Bas v. Tingy* (*The Eliza*, 4 Dall. 37), have decided, that the situation of this country with regard to France, was that of a partial and limited war. The substantial question here is, whether the case of the *Amelia* is a *casus belli*? whether she was an object of that limited war? The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce. It is precisely as if Con-

gress had authorized the capture of all French vessels, excepting those unarmed. If such had been the expressions, there could be no doubt of the right to capture. The object of the war being to destroy French armed force, and not French property, it made no difference in whom the absolute property of the vessel was, if her force was under the command of France. Suppose, the *Amelia* had captured an American, by what nation would the capture be made? by Hamburg or by France? There can be no doubt, but the injury would be attributed to France. She was under French colors, armed, and to every intent an object of the partial war which existed; and if so, her case is governed by the rights of war, and by the law of nations, as they exist in a state of general war.

Perhaps, it may be said, that this proves too much, and that, if true, the *Amelia* must be condemned as prize. This would be true, if the rights of a third party did not interfere. Having accomplished the object of the war, as it relates to this case, in wresting from France the armed force, we must now respect the rights of a neutral nation, and restore the property to its lawful owner. But this is a subsequent consideration: it is only necessary now to show that the capture was so far a lawful act, as to be capable of supporting a claim of salvage. At first view, she certainly presented the appearance of such an armed French ship as the libellant was bound in duty to seize and bring in, at least, for further examination. He had probable cause, at least, which is sufficient to justify the seizure and detention. But if she was liable to be condemned by France, being in the hands and possession of the French, she was within the scope of the war which existed between the United States and France; she was within the meaning of the act of Congress.¹

The act of July gives no new authority to recapture American vessels; it only gives to private armed vessels the same right which the act of May gives to the public armed vessels, to make captures and recaptures. But the act of May only authorizes the recapture of American vessels, "which may have been captured by any such armed vessel," *i. e.*, by armed vessels sailing under authority from the Republic of

¹*Bayard*.—What authority is there for American armed vessels to recapture British vessels taken by the French?

CHASE, J.—Is there any case, where it has been decided in our courts, that such a recapture was lawful? It has been so decided in the English courts.

The counsel on both sides admitted that no such case had occurred in this country.

France, and which shall have committed, or be found hovering on the coasts, for the purpose of committing, depredations on our commerce." Yet, the instructions from the President were to recapture all American vessels. These instructions show the opinion of the executive upon the construction of the acts of Congress—and for that purpose they were offered to be read.

The counsel for the *claimant* objected to their being read, because they were not in the record. The counsel for the *libellant* contended, they had a right to read them as matter of opinion, but did not offer them as matter of fact.¹ The court refused to hear them.

II. The second point is, that a service was rendered to the owners of the *Amelia*, by the recapture, inasmuch as she was thereby saved from condemnation in a French court of admiralty. To support this position, the counsel for the *libellant* relied on the general system of violation of neutral rights adopted by France.

In general cases, when belligerents respect the law of nations, no salvage can be claimed for the recapture of a neutral vessel, because no service is rendered; but rather a disservice, because the captured would, in the courts of the captors, recover damages and costs for the illegal capture and detention.

The principle upon which the circuit court decided, is not denied; but it is contended, that a service was rendered by the recapture. To show this, the counsel for the *libellant* offered to read the message from the President to both Houses of Congress, of 4th May, 1798, containing the communications from our envoys extraordinary at Paris, to the Department of State, and sundry *arrêts* and decrees of

¹CHASE, J.—I am against reading the instructions, because I am against bringing the executive into court on any occasion. It has been decided, as I think, in this court that instructions should not be read. I think it was in a case of instructions to the collectors. It was opposed by Judge Iredell, and the opposition acquiesced in by the court.

PATERSON, J.—The instructions can only be evidence of the opinion of the executive, which is not binding upon us.

MARSHALL, C. J.—I have no objection to hearing them, but they will have no influence on my opinion.

MOORE, J.—Mr. Bayard can state all they contain, and they may be considered as part of his argument.

Bayard.—May I be permitted to read them as a part of my speech?

THE COURT.—We are willing to hear them as the opinion of Mr. Bayard, but not as the opinion of the executive.

Bayard.—I acquiesce in the opinion of the court. My reasons for wishing to read them were, because the opinion of learned men, and men of science, will always have some weight with other learned men. And the court would consider well the opinion of the executive, before they would decide contrary to it.

the Government of France, in violation of neutral rights, and of the law of nations; and particularly the decree of the council of five hundred of 29th Nivose, an 6 (Jan. 18, 1798), which declares, "that the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded, in whole or in part, with merchandise, the production of England, or of her possessions, shall be declared good prize, whoever the owner of these goods or merchandise may be."

The counsel for the *claimant* objected to the reading of those dispatches, because they were matter of fact. No new fact can be shown on the writ of error. Neither the pleadings, nor the statement of facts accompanying the record, give notice of introducing this new matter. By the act of Congress (1 U. S. Stat. 83, § 19), a state of the case must come up with the record; and is conclusive on this court. *Wiscart v. D'Auchy*, 3 Dall. 321. On p. 327, Ellsworth, Chief Justice, said a writ of error removes only matter of law. *Arrêts* and decrees of foreign governments are matters of fact, and must be proved as such, and the court can not notice them unless shown in the pleadings, admitted or proved. *Freemoult v. Dedire*, 1 P. Wms. 429, 431; *Bernardi v. Motteux*, Doug. 557. The same case in the 2d edition, pp. 575-79. In that case, the court could not take notice of the *arrêt* of July, 1778, as it had not been given in evidence at the trial.

The general conduct of France is a matter of fact, which can only be noticed by the sovereign of the state. Judgment upon a writ of error must be upon the same facts upon which the judgment below was predicated. 3 Bl. Com. 405 (Williams's edit. 407); 8 T. R. 434, 438, 566. If it is matter of law, it is not such law as is binding upon this court, and therefore, they can not officially take notice of it. Foreign laws must be proved as facts. 3 Woodeson, 306; 2 Eq. Cas. Abr. 289, 476; *Way v. Yally*, 2 Salk. 651; s. c. 6 Mod. 195; *Mostyn v. Fabrigas*, Cowp. 174-5. The law must be given in evidence. 1 Bos. & Pul. 138, 171, 175, 8 T. R. 566. Facts can not be adduced to contradict the record. 8 T. R. 438. In *The Providentia*, 2 Rob. 126 (Am. edit.), Dr. Scott relied on the king's instructions, but that was because the king has the power of war and peace.

A state of the case is like a special verdict; nothing new can be added to it. In *The Santa Cruz*, 1 Rob. 57, Dr. Scott required the ordinances of Portugal to be proved, and evidence of the decisions of their tribunals upon them.

On the contrary, it was said by the counsel for the *libellant*, that this case differs from evidence offered to a jury. In chancery, if evidence is not legal, the chancellor will hear it, but will give it no weight. The pamphlet containing the dispatches is offered to be read, not to show what are the municipal laws of France, but what is the law of nations in France; to show how it has been modified by that government. We are before this court as a court of admiralty, and not as a court of common law. All the world are parties to a decree of a court of admiralty. *Bernardi v. Motteux*, Doug. 560 or 581. This court is now to decide by the law of nations, not by municipal regulations. All the cases cited against us are cases in common-law courts. But courts of admiralty take notice of foreign ordinances which affect the law of nations, without their being shown in evidence. *The Maria*, 1 Rob. 288 (Eng. ed. 341); and s. c. 1 Rob. 304 (Eng. ed. 363).

The object in reading these dispatches is to show that the law of nations was not respected in France; that the construction of their courts of admiralty was such, that their decisions could not conform to the law of nations; that the law of nations has been so modified in France, that there was no certainty of indemnity for neutrals, and that by the decrees and *arrêts* of that government, the *Amelia* would have been condemned. They are offered as the official communications of our authorized agents abroad to the executive, and by that department communicated to Congress, and published, in conformity to an act of Congress (1 U. S. Stat. 612), for the information of the citizens of the United States. This act of Congress has made them proper evidence before this court; who are, therefore, bound to notice them. On the subject of admitting foreign ordinances in a court of admiralty, no difficulty ever occurred. The objections are only to private municipal regulations. Such, it is admitted, must be proved as facts, but not when they are offered as explaining the law of nations. In *The Maria*, 1 Rob. 288 (Am. ed.), this very decree is cited; and it is immaterial to us, whether we read it out of the dispatches or out of the book which the opposite counsel have already cited for other purposes. By the same rule that they read pages 57 and 126, we may surely read page 288.

On the part of the *claimant* it was replied: That this decree is not an act of Congress, nor the law of nations, but simply a law of France. The record is confined to the facts which originally came up with the

writ of error, or such as may afterwards be procured upon a suggestion of diminution. It is admitted, that in equity, on an appeal to the House of Lords, nothing new can be received. And nothing ought now to be read which was not before the circuit court, or which that court was bound to notice. In the cases cited by the opposite counsel, the *arrêts* were read by consent. A common-law court is as much bound as a court of admiralty, to take notice of the law of nations, on a question where that law applies; and the rules by which common-law courts are bound, as to evidence of the law of nations, are equally binding on courts of admiralty.

The court suffered the dispatches and decrees of France to be read, but reserved the question, whether they ought to be considered in their decision of this cause, until the whole argument of the case should be finished.

The counsel for the *libellant* proceeded in the argument on the second point. The decree of the 18th of January, 1798, was not repealed, until the 14th of December, 1799, and consequently, was in full force at the time of the capture, on the 6th of September, 1799. The facts stated in the appendix to vol. 2 of Robinson's Reports, show that the French had discarded the law of nations, and that their conduct towards neutrals had been such as to exclude every possibility of escape. So notorious was this conduct, that Sir William Scott makes it the ground of his decision in various cases.

It is not necessary to show, that the *Amelia* would certainly have been condemned. To entitle to salvage, it is only necessary to show that she was in a better condition by the recapture. Her cargo was the production of the possessions of England, and therefore, by the decree of the 18th January, 1798, was liable to condemnation. The general conduct of France and of the French courts of admiralty towards neutrals has been repeatedly adjudged by Sir William Scott a good ground for salvage. (*The Two Friends*, 1 Rob. 232; *The War Onskan*, 2 *ibid.* 246.)

III. But without resorting to the general principle of a service being a ground for salvage, we claim it under the express terms of the act of Congress of the 2d of March, 1799, entitled "an act for the government of the navy of the United States," § 7 (1 U. S. Stat. 716), by which it is enacted, "that for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of

any nation in amity with the United States, if retaken from the enemy, within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, etc., and if after ninety-six hours, one-half; all of which is to be paid without any deduction whatsoever."

In the case of *Bas v. Tingy* (3 Dall. 37), it was decided by this court, that France was to be considered as an enemy. The case of the *Amelia* comes within the very words of this act of Congress. She is a ship belonging to citizens of a nation in amity with the United States, retaken from the enemy, after a possession of ninety-six hours.

By the act of Congress of 25th June, 1798 (1 U. S. Stat. 572), property of American citizens, recaptured by armed merchant vessels, is to be restored, on the payment of not less than one-eighth, and not more than one-half, for salvage. And by the act of the 3d March, 1800, not less than one-sixth is allowed on recapture by a private armed vessel, and one-eighth by a public ship-of-war. If, then, the recapture of this vessel was a lawful act, and if service was rendered thereby to the owners, the recaptors are entitled to salvage, and the rate of that salvage is, by the act of Congress, fixed at one-half of the value of the ship and cargo.

On the part of the *claimant*, it was said, that if France and America were at peace, the recapture was not authorized by the law of nations. The claim of salvage must rest on two grounds: 1. A right to interfere. 2. A benefit conferred on the owners.

I. It is admitted, that a belligerent has a right to detain a neutral vessel and carry her into port for the purpose of examination. The possession of a belligerent must, by third parties, be considered as lawful, whatever may be the motive or intent of such possession. (2 Woodeson, 424.) The belligerent has a lawful right to search merchant vessels, and this right can not be considered as injurious to the fair neutral trader. Resistance to such search is unlawful, and such resistance, a rescue, or an escape, are sufficient causes to condemn the neutral vessel. (Vattel, lib. 3, c. 7, § 114, p. 507; *The Maria*, 1 Rob. 304.)

The act of the recaptors, then, being in aid of the unlawful resistance of the neutral, must in itself be illegal. The courts of the captors only are competent to decide the question of prize or no prize. American citizens have no right to interfere, and wrest the neutral vessel from the possession of the belligerent.

The French have been represented as pirates, *hostes humani generis*.

But if France has waged so general a war on neutral property, has not England done the same? We find in their courts, that when a benefit is to accrue to British subjects, by such a decision, they decide that France must be presumed to respect the law of nations and to decree the restitution. *The Betsey*, 1 Rob. 84-5; *Geyer v. Aguilar*, 7 T. R. 695; but when salvage is to be given to British recaptors of neutral property, then it appears that France has lost all regard for the law of nations, and there is no chance of escape from her courts of admiralty. *The Two Friends*, 1 Rob. 232; *The War Onskan*, 2 *ibid.* 246.

But it is contended, that the courts of France would have decided according to the decree of the 18th January, 1798, and not according to the law of nations. This is not to be presumed; but if it was, however tyrannical the conduct of a belligerent may be, no neutral can lawfully interfere, unless she herself is injured, or her property or rights are affected; and even then individuals can not act. The injury must be redressed by the government, in the way of negotiation or war. What was the conduct of our government in such a case? It first chose to negotiate, and then to prepare for war. At the time the negotiation was begun, all the injurious decrees were in force, full in the view of the legislature, who authorized certain measures of hostility: but no citizen could go one step beyond what was authorized. The liability of the *Amelia* to condemnation in a French court of admiralty, created no right in Captain Talbot to capture her, even if that condemnation was certain.

But the facts of this case do not warrant such a conclusion. The fact stated is, that "the ship *Amelia* sailed from Calcutta, in Bengal, in the month of April, 1799, loaded with a cargo of the product and manufacture of that country." What country? Bengal. But Bengal is not stated to be one of the possessions of England. Not long since, the province of Bengal was in possession of sovereign princes; but it does not appear how far they have been subdued by the English. It is true, that the libel speaks of Calcutta as being an English port in the East Indies, but it does not follow, that the whole country of Bengal has been subjected to the British power. Besides, it is not the port from whence the vessel sails which taints the cargo, but its quality, as being the production of an English possession. Hence, it does not appear, that the *Amelia* was liable to condemnation under the decree of the 18th January, 1798, and we can not presume that she

would have been condemned. The French captors did not pretend she was liable under that decree, but sent her in to be judged according to the laws of war; that is, according to the law of nations as applicable to a state of war; and there being no fact stated to the contrary, we are to suppose, that she would have been so judged, and not otherwise. To have interfered on our part to prevent this would have been a just cause of hostilities against us. No citizen ought to be allowed to come into our courts to claim a reward, for an act which hazards the peace of the country.

If benefit be the criterion of salvage, then the greater the service the greater ought to be the salvage. But if the construction given by the opposite counsel to the act of 2d March, 1799, be correct, then the same salvage is due for the recapture of a clear neutral, as of a belligerent. And yet, in common wars, no salvage at all is due for the recapture of a neutral.

Every neutral nation has a right to choose her own manner of redress. We have no right to interfere, or to decide how far her vessels are liable to condemnation under French decrees. She may be willing to trust to the chances of acquittal or indemnification. We have no right to legislate upon the property of a foreign independent nation, and to say, that we will, whether you consent or not, rescue your vessels from the French, and then make you pay us salvage. (Vatt., lib. 2, c. 1, § 7, p. 123.) If an act, intended solely for my benefit, is advantageous to another, I am not entitled to reward. (*The Vryheid*, 2 Rob. 23-4.) In order to ground a claim of salvage, the danger of the property must have been, not hypothetical, but absolute; not distant and uncertain, but immediate and imminent: the act of saving must have been done with that sole intent, and must have been attended with labor, loss, expense or hazard to the salvor. The *Amelia* was taken by Captain Talbot, and libelled as a French vessel; his object was not to save a neutral, but to capture a belligerent. Under such a mistake, he might have a right to examine her further, but the moment she proved to be neutral property, he ought to have released her. His mistake can be no ground for a claim of salvage: it is a mere justification of an act of force, and as such may save him from the payment of damages and costs. In this case, there was no danger to the property, no trouble in saving it, nor any intention to benefit the owners. In Beawes' *Lex Mer.*, vol. 1, p. 158, it is said,

that to support a claim of salvage, the vessel must be in evident hazard, and must be saved by means used with that sole view.

The owner was a citizen of an independent nation, and ought to have had his election. Where is the law or the authority that allows salvage to one belligerent taking from another the property of a neutral? By the state of the case, this vessel was neutral as to all the belligerent powers. If the captor had applied for her, she must have been given up, upon the authority of the case of *Glass v. Gibbs*, 3 Dall. 6, without any compensation for recapture. Among the cases cited, the only one against us is *The War Onskan*, 2 Rob. 246. In that case, Sir William Scott says, that "lately" it has been the practice of his court to give salvage on recapture of neutral property out of the hands of the French; but that such is not the modern practice of the law of nations; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him; inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. But in that very case, however, we see that he might shortly change his course of decisions on that subject, so that, very probably, had that case been decided in the next term it would have been decided differently. No judge has a right to decide upon the departure of other nations from the law of nations, whatever evidence of such departure he may possess. There will be a variance in the decisions of the lower courts; it should, therefore, be put upon such a footing, as to make it clear and plain to all the judges of the inferior courts. This decision of Sir William Scott is a creature of his own, which he himself promises to change, when the situation of affairs will allow.

Sir William Scott gives salvage expressly on the ground of service rendered, on account of the kind of hostility which France exercised towards neutrals. But in this case, the statement of facts excludes the idea of hostility between France and Hamburg. The law of nations gave no right to recapture. The authority under the acts of Congress must be construed strictly, and confined to their express provisions. Neither the executive, nor individuals, nor the courts, have a right to alter them.

So far as war is not authorized by Congress, there is peace. It was

not contemplated by any act of Congress, that our vessels should capture Hamburg vessels. The mischief to be remedied by the act of May was, that the small armed vessels of France were hovering on our coasts, and taking our vessels almost in our ports. The act of Congress has completely met the evil, by authorizing the capture of such French vessels as had taken, or were found hovering, for the purpose of taking our vessels. This act, therefore, does not authorize the capture of a Hamburg vessel. There is no law which authorizes a capture for two purposes, viz., to be condemned as a French vessel, or to be subjected to salvage as a neutral. The *Amelia* was not navigating under the authority or pretended authority of France: she was engaged in a lawful trade. But if the French took possession of her, under suspicion of unlawful trade, that gave us no authority to take her from the possession of France, the property, under the law of nations, not being changed. The taking, being unlawful, can support no claim of salvage.

The act of July, 1798, authorizes only the capture of armed French vessels, and confines the cases of recapture to the ships or goods of citizens or residents of the United States. The capture can only be justified by the doubtful character of the vessel, and as soon as that was known to be neutral, Captain Talbot ought to have dismissed her; the detention afterwards was unlawful, and will not justify a decree for salvage. This vessel, it is true, might have been used to distress our commerce, and this might possibly be an excuse for detaining her, or even dismantling her, but will not entitle him to salvage.

If this vessel was lawful prize to France, then France has a claim for indemnity; but as she has made no claim, we must presume, the vessel would have been restored by her to the owners.

The act of Congress of March 2, 1799, upon which the counsel for the libellant rely, does not contemplate a case like the present. That is a permanent law, not made for the present war only, but intended to apply to all future wars. It could not, therefore, intend to give salvage, on the recapture of a neutral from a belligerent, which is not given by the law of nations, and which, it is allowed on all hands, is given, this war, for the first time, only on account of the conduct of France towards neutrals, and will cease, when that conduct shall be altered. Besides, it would give the same reward for taking the property of a neutral out of the hand of his friend, as out of the hand of his enemy. The word "enemy," in the 7th section of that act, means

the enemy of us and our ally, whose vessel is recaptured by our armed vessels, and not our enemy, who is the friend of our ally.

If, then, this is not a statutory case of salvage, we must recur to the question of benefit. In the court below they relied wholly on the act of Congress: not a word was said respecting the service rendered. Let us then consider the claim of *quantum meruit*. To support this, there must be, 1. A lawful consideration; and 2. A contract, express or implied.

To make the consideration lawful, it must be permitted by law; *a fortiori*, it must not be contrary to law. It is not authorized by our law, to take the property of a neutral out of the possession of his friend, and it is in direct opposition to policy, as it tends to commit the peace of the country. It is not alleged, that there was any express contract; and a contract can not be implied, because the intent with which she was taken, viz., to be condemned as a French armed vessel, excludes the idea. Nor can an implied contract be raised, on the retaining her, because that was a state of duress, which can not be made the ground of a reward.

But if this case is to be considered upon a *quantum meruit*, then the amount of salvage must depend upon the danger and the exertion. *The San Bernardo*, 1 Rob. 151; and *The Two Friends*, *ibid.* 240. It is said, that in cases of unauthorized capture or recapture, the property goes to the crown (*The Princessa*, 2 Rob. 45), and it is sometimes referred to the court to fix the reward of the captors. It follows, then, that the property goes to the government, and they alone can fix the reward; but our code gives no right to salvage in this case, nor does the state of hostilities between the two countries, as disclosed on the record, justify it. But if the decree and the notoriety of the misconduct of France, are to be admitted to prove a benefit conferred, who can say it was worth \$94,000, the half of the gross amount of sales of the ship and cargo? Neither the service rendered, the danger to the property, nor the exertion in saving it, can justify so enormous a reward. The decree of France might be only *in terrorem*, and so no danger. If the *Amelia* was not liable to condemnation in the French courts, then no service was rendered, and consequently, no salvage ought to be allowed.

But if she was liable to condemnation, then the recapture is a violation of the rights of France. If France violates the laws of nations, it is no justification of a violation of them on our part. An

illegal power to take, given by France to her cruisers, does not authorize us to retake. In the case of *Bas v. Tingy* (4 Dall. 37), the reasoning of the court seems to admit that the act of 2d March, 1799, will not apply, in the present state of hostilities, to recaptures of the vessels of nations in amity with the United States, unless the owners are residents of the United States; because there could be no lawful recapture of a neutral from the hand of a belligerent. Judge Moore, in delivering his opinion in that case, says, "It is, however, more particularly urged that the word 'enemy' can not be applied to the French; because the section in which it is used, is confined to such a state of war as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war does not exist between America and France. A number of books have been cited, to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of America and France could be communicated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of 'enemies.' It is for the honor and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and surely, Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy. Nor does it follow, that the act of March, 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of recaptured property belonging to our own citizens, and in the event of a future war, it might also be applied to the case of recaptured property belonging to a nation in amity with the United States."

And in the same case, Judge Washington observed, "that hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission." And again he says, "It has likewise been said, that the 7th

section of the act of March, 1799, embraces cases which, according to preexisting laws, could not then take place, because no authority had been given to recapture friendly vessels from the French, and this argument was strongly and forcibly pressed. But because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest whenever they should arise. It is a permanent law, embracing a variety of subjects; not made in relation to the present war with France only, but in relation to any future war with her, or with any other nation. It might, then, very properly allow salvage for recapturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends; and whenever such a war should exist between the United States and France, or any other nation, as, according to the law of nations, or special authority, would justify the recapture of friendly vessels, it might, on that event, with similar propriety, apply to them; which furnishes, I think, the true construction of the act. The opinion which I delivered at New York, in *Talbot v. Seeman*, was, that although an American vessel could not justify the taking of a neutral vessel from the French, because neither the sort of war that subsisted, nor the special commission under which the American acted, authorized the proceeding; yet that the 7th section of the act of 1799, applied to recaptures from France, as an enemy, in all cases authorized by Congress. And on both points, my opinion remains unshaken; or, rather, has been confirmed by the very able discussion which the subject has lately undergone in this court, on the appeal from my decree."¹

Similar sentiments were also expressed by Judge Chase and Judge Paterson, in the same case. From these opinions, it seems clearly to result, that the act of March 2, 1799, can not be the rule of salvage in this case.

On the part of the *libellant*, it was stated, in reply, as to the admissibility of the dispatches from the American envoys, and the French *arrêt* of 18th January, 1798, that courts of admiralty will always take notice of such laws of foreign countries as go to modify or change the law of nations, and are not bound by the same rules of evidence, as courts of common law. 1 Dall. 463; Lofft, 631; Doug.

¹This case of *Talbot v. Seeman* was argued once before, in this court, at Philadelphia. See 4 Dall. 34.

619, 622, 649, 650, 554. The opposite counsel have cited and relied on Robinson's Reports, to show what was the ancient law of France, and surely, we have as good a right to cite the same book, to show what is the present law of France. In *The Maria*, 1 Rob. 288, this *arrêt* of France is cited and argued upon by the judge.

The cases cited by the opposite counsel to show that foreign laws must be proved as facts, are all cases at common law, or relate to the mere municipal laws of a foreign country; and are not such as go to modify or explain the law of nations, as that country has adopted it. The case in *P. Williams* refers to a municipal law, which had no connection with the law of nations. The same observation applies to the cases from 6 Mod., and 2 Salk. No case can be produced, where a law of a foreign country, authenticated as this is by an act of the legislature of our country, has been refused to be considered by a court.

As to the objection, that the cargo does not appear to be the production of England, or her possessions, because there is no evidence that the whole of the province of Bengal has been subjected to the dominion of England; it may be sufficient to observe, that the libel and answer admit Calcutta to be an English port, and the case stated says, the vessel sailed from Calcutta, in Bengal, loaded with a cargo of the product and manufacture of that country. It being admitted, that Calcutta is an English port, and that the cargo was the production of that country, it follows, unless the contrary is clearly shown in evidence, that the cargo was the product of an English possession.

It is said, that there is no evidence that France carried her unjust decrees into execution, and that they might only be enacted *in terrorem*. But the fact is notorious to all the world: Congress have expressly declared it in the preambles of their acts: the whole system of hostility is founded upon it, and can be justified on no other ground. They have further declared it, by ordering the dispatches to be published and distributed among the citizens of the United States, for their information. It would be strange, if this court, sitting here as a court of the law of nations, to try a cause in which all the world are parties, should be the only persons in the world ignorant of the fact.

The general principle is admitted, that salvage is not due for the recapture of a neutral from a belligerent, and for this reason, that by the law of nations, the neutral would be restored by the captor, with damages and costs. But *cessante ratione, cessat lex*. And it follows,

by powerful inference, that if the captor would not have restored the neutral, with damages and costs, salvage ought to be allowed. To bring the *Amelia* within this inference, it is only necessary to show, that she would not have been restored with damages and costs. If the court should take into consideration the *arrêt* of the 18th of January, 1798, and the fact, that the cargo was the production of an English possession, there is no doubt but, instead of being restored with damages and costs, she would have been condemned and totally lost to her owners. Is no salvage due, for so certain and so signal a benefit?

It is said, that unless salvage is expressly given by the act of Congress, it can only be claimed upon a contract, either express or implied. This is not the case. The claim of salvage upon recapture never is supposed to arise *ex contractu*. It is given as a reward for the benefit received, and where there is no express statute upon the subject, the amount is to be regulated, not by the labor or hazard of the recaptor, nor by his intention to concur a benefit, but by the supposed amount which the owner would have been willing to give for the rescue of his property. Woodeson, 423. In *The Two Friends*, 1 Rob. 234-5, the rule of salvage on rescue is said to be *quantum meruit*. And in the same case, p. 232, Sir W. Scott says, "it has been slightly questioned in the act of court (which contains the exposition of facts given by both parties), whether there was such a state of hostilities between America and France as to raise a title of salvage for American goods retaken from the French. But this point has not been pursued in argument; and indeed, I should wonder if it had, after the determinations of this court, which have, in various instances, decreed salvage in similar cases. It is not for me to say, whether America is at war with France, or not; but the conduct of France towards America has been such *de facto*, as to induce American owners to acknowledge the services by which they have recovered their ships and cargoes out of the hands of French cruisers, by force of arms."

In the case of *Bas v. Tingy*, the question was not argued, whether salvage could be claimed upon the recapture of a neutral, on the ground of benefit rendered; and, therefore, the opinion of the court in that case does not militate with our claim.

August 11, 1801. MARSHALL, C. J., delivered the opinion of the court: This is a writ of error to a decree of the circuit court for the

district of New York, by which the decree of the district court of that State, restoring the ship *Amelia* to her owner on the payment of one-half for salvage, was reversed, and a decree rendered, directing the restoration of the vessel without salvage.

The facts agreed by the parties, and the pleadings in the cause, present the following case: The ship *Amelia* sailed from Calcutta, in Bengal, in April, 1799, loaded with a cargo of the product and manufacture of that country, and was bound to Hamburg. On the 6th September, she was captured by the French national corvette *La Diligente*, commanded by L. J. Dubois, who took out the master, part of the crew and most of the papers of the *Amelia*, and putting a prize-master and French sailors on board her, ordered her to St. Domingo, to be judged according to the laws of war. On the 15th of September, she was recaptured by Captain Talbot, commander of the *Constitution*, who ordered her into New York for adjudication. At the time of the recapture, the *Amelia* had eight iron cannon, and eight wooden guns, with which she left Calcutta. From the ship's papers, and other testimony, it appeared, that she was the property of Chapeau Rouge, a citizen and merchant of Hamburg; and it was conceded by the counsel below, that France and Hamburg were not in a state of hostility with each other, and that Hamburg was to be considered as neutral between the present belligerent powers.

The district court of New York, before whom the cause first came, decreed one-half of the gross amount of the ship and cargo as salvage to the recaptors. The circuit court of New York reversed this decree, from which reversal, the recaptors appealed to this court. The *Amelia* was libelled as a French vessel, and the libellant prays that she may be condemned as prize; or, if restored to any person entitled to her as the former owner, that such restoration should be made on paying salvage. The claim and answer of Hans Frederic Seeman discloses the neutral character of the vessel, and claims her on behalf of the owners.

The questions growing out of the facts, and to be decided by the court, are: Is Captain Talbot, the plaintiff in error, entitled to any, and if to any, to what salvage, in the case which has been stated?

Salvage is a compensation for actual service rendered to the property charged with it. It is demandable of right for vessels saved from pirates, or from the enemy. In order, however, to support the demand, two circumstances must concur. 1. The taking must be lawful. 2. There must be a meritorious service rendered to the recaptured.

1. The taking must be lawful; for no claim can be maintained in a court of justice, founded on an act in itself tortious. On a recapture, therefore, made by a neutral power, no claim for salvage can arise, because the act of retaking is a hostile act, not justified by the situation of the nation to which the vessel making the recapture belongs, in relation to that from the possession of which such recaptured vessel was taken. The degree of service rendered the rescued vessel is precisely the same as if it had been rendered by a belligerent; yet the rights accruing to the recaptor are not the same, because no right can accrue from an act in itself unlawful.

In order, then, to decide on the right of Captain Talbot, it becomes necessary to examine the relative situation of the United States and France at the date of the recapture. The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor, in the course of the argument, has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed. To determine the real situation of America in regard to France, the acts of Congress are to be inspected.

The first act on this subject passed on the 28th of May, 1798, and is entitled "An act more effectually to protect the commerce and coasts of the United States." This act authorizes any armed vessel of the United States to capture any armed vessel sailing under the authority, or pretense of authority, of the Republic of France, which shall have committed depredations on vessels belonging to the citizens of the United States, or which shall be found hovering on the coasts, for the purpose of committing such depredations. It also authorizes the recapture of vessels belonging to the citizens of the United States.

On the 25th of June, 1798, an act was passed "to authorize the defense of the merchant vessels of the United States against French depredations." This act empowers merchant vessels, owned wholly by citizens of the United States, to defend themselves against any attack which may be made on them by the commander or crew of any armed vessel sailing under French colors, or acting, or pretending to act, by or under the authority of the French Republic; and to capture any such vessel. This act also authorizes the recapture of merchant vessels belonging to the citizens of the United States. By the 2d

section, such armed vessel is to be brought in and condemned for the use of the owners and captors. By the same section, recaptured vessels belonging to the citizens of the United States, are to be restored, they paying for salvage not less than one-eighth nor more than one-half of the true value of such vessel and cargo.

On the 28th of June, an act passed "in addition to the act more effectually to protect the commerce and coasts of the United States." This authorizes the condemnation of vessels brought in under the first act, with their cargoes, excepting only from such condemnation, the goods of any citizen or person resident within the United States, which shall have been before taken by the crew of such captured vessel. The second section provides that whenever any vessel or goods, the property of any citizen of the United States, or person resident therein, shall be recaptured, the same shall be restored, he paying for salvage one-eighth part of the value, free from all deductions.

On the 9th of July, another law was enacted, "further to protect the commerce of the United States." This act authorizes the public armed vessels of the United States to take any armed French vessel, found on the high seas. It also directs such armed vessel, with her apparel, guns, etc., and the goods and effects found on board, being French property, to be condemned as forfeited. The same power of capture is extended to private armed vessels. The sixth section provides, that the vessel or goods of any citizen of the United States, or person residing therein, shall be restored, on paying for salvage not less than one-eighth, nor more than one-half, of the value of such recapture, without any deduction.

The seventh section of the act for the government of the navy, passed the 2d of March, 1799, enacts, "That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage," and if they have remained above ninety-six hours in possession of the enemy, one-half is to be allowed.

On the 3d of March, 1800, Congress passed "an act providing for salvage in cases of recapture." This law regulates the salvage to be paid "when any vessels or goods, which shall be taken as prize as aforesaid, shall appear to have before belonged to any person or persons permanently resident within the territory, and under the protection, of any foreign prince, government or state, in amity with the

United States, and to have been taken by an enemy of the United States, or by authority, or pretense of authority, from any prince, government or state, against which the United States have authorized, or shall authorize, defense or reprisals."

These are the laws of the United States which define their situation in regard to France, and which regulate salvage to accrue on recaptures made in consequence of that situation.

A neutral armed vessel which has been captured, and which is commanded and manned by Frenchmen, whether found cruising on the high seas, or sailing directly for a French port, does not come within the description of those which the law authorizes an American ship of war to capture, unless she be considered *quoad hoc* as a French vessel.

Very little doubt can be entertained, but that a vessel thus circumstanced, encountering an American unarmed merchantman, or one which should be armed, but of inferior force, would as readily capture such merchantman, as if she had sailed immediately from the ports of France. One direct and declared object of the war, then, which was the protection of the American commerce, would as certainly require the capture of such a vessel, as of others more determinately specified. But the rights of a neutral vessel, which the Government of the United States can not be considered as having disregarded, here intervene; and the vessel certainly is not, correctly speaking, a French vessel.

If the *Amelia* was not, on the 15th of September, 1799, a French vessel, within the description of the act of Congress, could her capture be lawful? It is, I believe, a universal principle, which applies to those engaged in a partial, as well as those engaged in a general war, that where there is probable cause to believe the vessel met with at sea, is in the condition of one liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts. The *Amelia* was an armed vessel, commanded and manned by Frenchmen. It does not appear, that there was evidence on board to ascertain her character. It is not then to be questioned, but that there was probable cause to bring her in for adjudication. The recapture, then, was lawful.

But it has been insisted, that this recapture was only lawful in consequence of the doubtful character of the *Amelia*, and that no right of salvage can accrue from an act which was founded in mistake, and

which is only justified by the difficulty of avoiding error, arising from the doubtful circumstances of the case. The opinion of the court is, that had the character of the *Amelia* been completely ascertained by Captain Talbot, yet, as she was an armed vessel, under French authority, and in a condition to annoy the American commerce, it was his duty to render her incapable of mischief. To have taken out the arms, or the crew, was as little authorized by the construction of the act of Congress contended for by the claimants, as to have taken possession of the vessel herself.

It has, I believe, been practised in the course of the present war, and if not, is certainly very practicable, to man a prize and cruise with her for a considerable time, without sending her in for condemnation. The property of such vessel would not, strictly speaking, be changed, so as to become a French vessel, and yet it would probably have been a great departure from the real intent of Congress, to have permitted such vessel to cruise unmolested. An armed ship, under these circumstances, might have attacked one of the public vessels of the United States. The acts which have been recited expressly authorize the capture of such vessel, so commencing hostilities, by a private armed ship, but not by one belonging to the public. To suppose, that a capture would in one case be lawful, and in the other unlawful; or to suppose, that even in the limited state of hostilities in which we were placed two vessels armed and manned by the enemy, and equally cruising on American commerce, might the one be lawfully captured, while the other, though an actual assailant, could not; or if captured, that the act could only be justified from the probable cause of capture furnished by appearances, would be to attribute a capriciousness to our legislation on the subject of war, which can only be proper when inevitable.

There must, then, be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise. This was obviously the sense of Congress. If by the laws of Congress on this subject, that body shall appear to have legislated upon a perfect conviction that the state of war in which this country was placed, was such as to authorize recaptures, generally, from the enemy; if one part of the system shall be manifestly founded on this construction of the other part, it would have considerable weight in rendering certain, what might before have been doubtful.

Upon a critical investigation of the acts of Congress, it will appear,

that the right of recapture is expressly given, in no single instance, but that of a vessel or goods belonging to a citizen of the United States. It will also appear, that the *quantum* of salvage is regulated, as if the right to it existed previous to the regulation.

Although no right of recapture is given, in terms, for the vessels and goods belonging to persons residing within the United States, not being citizens, yet an act, passed so early as the 28th of June, 1798, declares, that vessels and goods of this description, when recaptured, shall be restored on paying salvage; thereby plainly indicating, that such recapture was sufficiently warranted by law, to be the foundation of a claim for salvage. If the recapture of vessels of one description, not expressly authorized by the very terms of the act of Congress, be yet a rightful act, recognized by Congress as the foundation for a claim to salvage, which claim Congress proceeds to regulate, then it would seem, that other recaptures from the same enemy are equally rightful; and where the claim they afford for salvage has not been regulated by Congress, such claim must be determined by the principles of general law.

In this situation remained the recaptured vessels of any other power, also at war with France, until the act of the 2d of March, 1799, which regulates the salvage demandable from them. Neither by that act, nor by any previous act, was a power given, in terms, to recapture such vessels. But their recapture was an incident which unavoidably grew out of the state of the war. On the capture of a French vessel, having with her as a prize the vessel of such a power, the prize was inevitably recaptured. On the idea, that the recapture was lawful, and that it was a foundation on which the right to salvage could stand, the legislature, in March, 1799, declared what the amount of that salvage should be. The expression of this act is by no means explicit. If it extends to neutrals, then it governs in this case; if otherwise, the law respecting them continued still longer, on the same ground with the law respecting a belligerent, prior to the passage of the act of the 2d of March, 1799. Thus it continued until the 3d of March, 1800, when the legislature regulated the salvage to be paid by neutrals, recaptured from a power against which the United States have authorized defense or reprisals.

This act having passed subsequently to the recapture of the *Amelia*, can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before. But it manifests, in like

manner with the laws already commented on, the system which Congress considered itself as having established. This act was passed at a time when no additional hostility against France could have been contemplated. It was only designed to keep up the defensive system which had before been formed, and which it was deemed necessary to continue, until the negotiation then pending should have a pacific termination. Accordingly, there is no expression in the act extending the power of recapture, or giving it, in the case of neutrals. This power is supposed to exist, as an incident growing out of the state of war, and the right to salvage produced by that power is regulated in the act.

In case of a recapture, subsequently to the act, no doubt could be entertained, but that salvage, according to its terms, would be demandable. Yet there is not a syllable in it which would warrant an idea, that the right of recapture was extended by it, or did not exist before. It must then have existed, from the passage of the laws, which commenced a general resistance to the aggressions we had so long experienced and submitted to.

It is not unworthy of notice, that the first regulation of the right of salvage in the case of a recapture, not expressly enumerated among the specified acts of hostility warranted by the law, is to be found in one of those acts which constitute a part of the very system of defense determined on by Congress, and is the first which subjects to condemnation the prizes made by our public ships of war.

It has not escaped the consideration of the court, that a legislative act, founded on a mistaken opinion of what was law, does not change the actual state of the law as to preexisting cases. This principle is not shaken by the opinion now given. The court goes no further than to use the provisions in one of several acts forming a general system, as explanatory of other parts of the same system; and this appears to be in obedience to the best established rules of exposition, and to be necessary to a sound construction of the law.

An objection was made to the claim of salvage, by one of the counsel for the defendant in error, unconnected with the acts of Congress, and which it is proper here to notice. He states, that to give title to salvage, the means used must not only have produced the benefit, but must have been used with that sole view. For this he cites *Beawes' Lex Mer.* 158. The principle is applied by Beawes to the single case of a vessel saved at sea, by throwing overboard a part of her cargo.

In that case, the principle is unquestionably correct, and in the case of a recapture, it is as unquestionably incorrect. The recaptor is seldom actuated by the sole view of saving the vessel, and in no case of the sort, has the inquiry ever been made. It is, then, the opinion of the court, on a consideration of the acts of Congress, and of the circumstances of the case, that the recapture of the *Amelia* was lawful; and that, if the claim to salvage be in other respects well founded, there is nothing to defeat it in the character of the original taking.

2. It becomes then necessary to inquire, whether there has been such a meritorious service rendered to the recaptured, as entitles the recaptor to salvage?

The *Amelia* was a neutral ship, captured by a French cruiser, and recaptured while on her way to a French port, to be adjudged according to the laws of war. It is stated to be the settled doctrine of the law of nations, that a neutral vessel, captured by a belligerent, is to be discharged without paying salvage: and for this several authorities have been quoted, and many more might certainly be cited. That such has been a general rule, is not to be questioned. As little is it to be questioned, that this rule is founded exclusively on the supposed safety of the neutral. It is expressly stated in the case of *The War Onskan*, cited from Robinson's Reports, to be founded on this plain principle, "that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him, inasmuch as that the same enemy would be compelled, by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention." It is not unfrequent, to consider and speak of a regular practice under a rule, as itself forming a rule. A regular course of decisions on the text of the law, constitutes a rule of construction, by which that text is to be applied to all similar cases: but alter the text, and the rule no longer governs. So, in the case of salvage. The general principle is, that salvage is only payable, where a meritorious service has been rendered. In the application of this principle, it has been decided, that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture; and ought not, therefore, to pay salvage.

The principle is, that without benefit, salvage is not payable: and it is merely a consequence from this principle, which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to

condemnation all neutrals captured by its cruisers, and who will say, that no benefit is conferred by a recapture? In such a course of things, the state of the neutral is completely changed. So far from being safe, he is in as much danger of condemnation, as if captured by his own declared enemy. A series of decisions, then, and of rules founded on his supposed safety, no longer apply: only those rules are applicable, which regulate a situation of actual danger. This is not, as it has been termed, a change of principle; but a preservation of principle, by a practical application of it, according to the original substantial good sense of the rule.

It becomes, then, necessary to inquire, whether the laws of France were such as to have rendered the condemnation of the *Amelia* so extremely probable, as to create a case of such real danger, that her recapture by Captain Talbot must be considered as a meritorious service entitling him to salvage. To prove this, the counsel for the plaintiff in error has offered several decrees of the French Government, and especially, one of the 18th of January, 1798.

Objections have been made to the reading of these decrees, as being the laws of a foreign nation, and therefore, facts, which, like other facts, ought to have been proved, and to have formed a part of the case stated for the consideration of the court. That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, can not be questioned. The real and only question is, whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law, by a court of admiralty of that country, or must be still further proved as a fact.

The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted (and such seems to have been the general practice) in which the marine ordinances of a foreign nation are read as law, without being proved as facts. It has been said, that this is done by consent: that it is a matter of general convenience, not to put parties to the trouble and expense of proving permanent and well-known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet, this decree having been promulgated in the United States as the law of France,

by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts. It is, therefore, the opinion of the court, that the decree should be read as an authenticated copy of a public law of France, interesting to all nations.

The decree ordains, that "the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded, in whole or in part, with merchandise, the production of England or her possessions, shall be declared good prize, whoever the owner of these goods or merchandise may be." This decree subjects to condemnation in the courts of France, a neutral vessel, laden, in whole or in part, with articles the growth of England or any of its possessions. A neutral thus circumstanced can not be considered as in a state of safety: his recaptor can not be said to have rendered him no service. It can not reasonably be contended, that he would have been discharged in the ports of the belligerent, with costs and damages.

Let us, then, inquire, whether this was the situation of the *Amelia*. The first fact states her to have sailed from Calcutta, in Bengal, in April, 1799, laden with a cargo of the product and manufacture of that country. Here it is contended, that the whole of Bengal may possibly not be in the possession of the English, and, therefore, it does not appear that the cargo was within the description of the decree. But to this, it has been answered, that in inquiring whether the *Amelia* was in danger or not, this court must put itself in the place of a French court of admiralty, and determine as such court would have determined. Doing this, there seems to be no reason to doubt, that the cargo, without inquiring into the precise situation of the British power in every part of Bengal, being *prima facie* of the product and manufacture of a possession of England, would have been so considered, unless the contrary could have been plainly shown.

The next fact relied on by the defendant in error is, that the *Amelia* was sent to be adjudged according to the laws of war, and from thence it is inferred, that she could not have been judged according to the decree of the 18th of January. It is to be remembered, that these are the orders of the captor, and without a question, in the language of a French cruiser, a law of his own country furnishing a rule of conduct in time of war, will be spoken of as one of the laws of war.

But the third and fourth facts in the statement admit the *Amelia*, with her cargo, to have belonged to a citizen of Hamburg, which city was not in a state of hostility with the Republic of France, but was to be considered as neutral between the then belligerent powers. It has been contended, that these facts not only do not show the recaptured vessel to have been one on which the decree could operate, but positively show that the decree could not have affected her. The whole statement, taken together, amounts to nothing more than that Hamburg was a neutral city; and it is precisely against neutrals, that the decree is in terms directed. To prove, therefore, that the *Amelia* was a neutral vessel, is to prove her within the very words of the decree, and consequently, to establish the reality of her danger.

Among the very elaborate arguments which have been used in this case, there are some which the court deem it proper more particularly to notice. It has been contended, that this decree might have been merely *in terrorem*; that it might never have been executed; and that, being in opposition to the law of nations, the court ought to presume it never would have been executed. But the court can not presume the laws of any country to have been enacted *in terrorem*; nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete; and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government.

It has been contended, that France is an independent nation, entitled to the benefits of the law of nations; and further, that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct. These positions have never been controverted; but they lead to a very different result from that which they have been relied on as producing.

The respect due to France is totally unconnected with the danger in which her laws had placed the *Amelia*; nor is France in any manner to be affected by the decree this court may pronounce. Her interest in the vessel was terminated by the recapture, which was authorized by the state of hostility then subsisting between the two nations. From that time, it has been a question only between the *Amelia* and the recaptor, with which France has nothing to do.

It is true, that a violation of the law of nations by one power does

not justify its violation by another; but that remonstrance is the proper course to be pursued, and this is the course which has been pursued. America did remonstrate, most earnestly remonstrate, to France, against the injuries committed on her; but remonstrance having failed, she appealed to a higher tribunal, and authorized limited hostilities: this was not violating the law of nations, but conforming to it. In the course of these limited hostilities, the *Amelia* has been recaptured, and the inquiry now is, not whether the conduct of France would justify a departure from the law of nations, but what is the real law in the case? This depends on the danger from which she has been saved.

Much has been said about the general conduct of France and England on the seas, and it has been urged, that the course of the latter has been still more injurious than that of the former. That is a consideration not to be taken up in this cause: animadversions on either, in the present case, would be considered as extremely unbecoming the judges of this court, who have only to inquire what was the real danger in which the laws of one of the countries placed the *Amelia*, and from which she has been freed by her recapture.

It has been contended, that an illegal commission to take, given by France, can not authorize our vessels to retake; that we have no right by legislation to grant salvage out of the property of a citizen of Hamburg, who might have objected to the condition of the service. But it is not the authority given by the French Government to capture neutrals, which is legalizing the recapture made by Captain Talbot; it is the state of hostility between the two nations which is considered as having authorized that act. The recapture having been made lawfully, then the right to salvage, on general principles, depends on the service rendered. We can not presume this service to have been unacceptable to the Hamburger, because it has bettered his condition; but a recapture must always be made without consulting the recaptured. The act is one of the incidents of war, and is, in itself, only offensive as against the enemy. The subsequent fate of the recaptured depends on the service he has received, and on other circumstances.

To give a right to salvage, it is said, there must be a contract, either express or implied. Had Hamburg been in a state of declared war with France, recaptured vessels of that city would be admitted to be liable to pay salvage. If a contract be necessary, from what circumstances would the law, in that state of things, imply it? Clearly,

from the benefit received, and the risk incurred. If, in the actual state of things, there was also benefit and risk, then the same circumstances concur, and they warrant the same result.

It is also urged, that to maintain this right, the danger ought not to be merely speculative, but must be imminent and the loss certain. That a mere speculative danger will not be sufficient to entitle a person to salvage, is unquestionably true. But that the danger must be such, that escape from it by other means was inevitable, can not be admitted. In all the cases stated by the counsel for the defendant in error, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew, or by a sudden tempest. A ship on the rocks might possibly be gotten off, by the aid of wind and tides, without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them; or they might even be blown by a storm into a port of the country to which the prize vessel originally belonged. It can not, therefore, be necessary that the loss should be inevitably certain; but it is necessary that the danger should be real and imminent. It is believed to have been so, in this case. The captured vessel was of such description that the law by which she was to be tried, condemned her as good prize to the captor. Her danger, then, was real and imminent. The service rendered her was an essential service, and the court is, therefore, of opinion, that the recaptor is entitled to salvage.

3. The next object of inquiry is, what salvage ought to be allowed? The captors claim one-half the gross value of the ship and cargo. To support this claim they rely on the "act for the government of the navy of the United States," passed the 2d of March, 1799. This act regulates the salvage payable on the ships and goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, retaken from the enemy. It has been contended, that the case before the court is in the very words of the act. That the owner of the *Amelia* is a citizen of a state in amity with the United States, retaken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a recaptured vessel belonging to a nation engaged with the United States against the same enemy. The words of the act would certainly admit of this construction.

Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law. If the construction contended for be given to the act, it subjects to the same rate of salvage a recaptured neutral, and a recaptured belligerent vessel. Yet, according to the law of nations, a neutral is generally to be restored without salvage.

This argument, in the opinion of the court, derives great additional weight from the consideration that the act in question is not temporary, but permanent. It is not merely fitted to the then existing state of things, and calculated to expire with them, but is a regulation applying to present and future times. Whenever the danger resulting to captured neutrals from the laws of France should cease, then, according to the principles laid down in this decree, the liability of recaptured neutrals to the payment of salvage would, in conformity with the general law and usage of nations, cease also. This event might have happened, and probably did happen, before hostilities between the United States and France were terminated by treaty. Yet, if this law applies to the case, salvage from a recaptured neutral would still be demandable. This act, then, if the words admit it, since it provides a permanent rule for the payment of salvage, ought to be construed to apply only to cases in which salvage is permanently payable.

On inspecting the clause in question, the court is struck with the description of those from whom the vessel is to be retaken, in order to come within the provisions of the act. The expression used is, the enemy: a vessel retaken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction, the act of Congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.

If this act does not comprehend the case, then the court is to decide, on a just estimate of the danger from which the recaptured was saved, and of the risk attending the retaking of the vessel, what is a reasonable salvage. Considering the circumstances, and considering also what rule has been adopted in other courts of admiralty, one-sixth appears to be a reasonable allowance.

It is, therefore, the opinion of the court, that the decree of the

circuit court, held for the district of New York, was correct, in reversing the decree of the district court, but not correct in decreeing the restoration of the *Amelia*, without paying salvage. This court, therefore, is of opinion, that the decree, so far as the restoration of the *Amelia*, without salvage, is ordered, ought to be reversed, and that the *Amelia* and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the net value, after deducting therefrom the charges which have been incurred.

THE UNITED STATES v. THE SCHOONER PEGGY¹

Definitive decree.—Judicial notice.—High seas

A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation, within the meaning of the 4th article of the convention with France, signed September 30, 1800.

The court is as much bound, as the executive, to take notice of a treaty, and will reverse the original decree of condemnation (although it was correct when made), and decree restoration of the property, under the treaty made since the original condemnation.

Quære? As to the extent of the term high seas?

Error to the Circuit Court for the District of Connecticut, on a question of prize. The facts found and stated by Judge Law, the district judge, were as follows:

That the ship *Trumbull*, duly commissioned by the President of the United States, with instructions to take any armed French vessel or vessels, sailing under authority, or pretense of authority, from the French Republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, etc., as set forth in said instructions; and said ship did, on the 24th day of April last (April, 1800), capture the schooner *Peggy*, after running her ashore, a few miles to the westward of Port au Prince, within the dominions and territory of General Toussaint, and has brought her into port, as set forth in the libel; and it further appears, that all the facts contained in the claim are true;² whereupon, this court are of opinion that as it

¹ Cranch, 103.

²The material facts stated in the claim are, that the schooner was the property of citizens of the French Republic; that she was permitted by Toussaint to receive on board the cargo, which was on board at the time of capture; that

appears that the said schooner was solely upon a trading voyage, and sailed under the permission of Toussaint, with dispatches for the French Government, under a convoy furnished by Toussaint, with directions to touch at Leogane for supplies, and that the arms she had on board must be presumed to be only for self-defense; neither does it appear she had ever made, or attempted to make, any depredations, and that she was not such an armed vessel as was meant and intended by the laws of the United States should be subject to capture and condemnation; and that the situation she was in, at the time of capture, being aground within the territory and jurisdiction of Toussaint, she was not on the high seas, so as to be intended to be within the instructions given to the commanders of American ships of war: therefore, adjudge said schooner is not a lawful prize, and decree that said schooner with her cargo be restored to the claimant.

From this decree, the attorney for the United States, in behalf of the United States and the commander, officers and crew of the *Trumbull*, appealed to the circuit court, in which Judge Cushing sat alone, as the district judge declined sitting in the cause, on account of the interest of his son, who was one of the officers on board the *Trumbull*, at the time of capture, and who, if the schooner should be condemned, would be entitled to a share of the prize-money. The circuit court, on the appeal, found the following facts, and gave the following opinion and decree:

That David Jewett, commander of the said public armed vessel, called the *Trumbull*, being duly commissioned, and instructed by the President of the United States, as set forth in the said libel, did, on or about the 23d of April last, capture the said schooner *Peggy*, after running her aground, about pistol-shot from the shore, a few miles to the westward of Port au Prince, called also Port Republican, on the coast of the island of St. Domingo, and

she had dispatches from Toussaint to France; that she sailed by his authority, on the 23d of April, for France, navigated by ten men, including Buisson, the claimant, and Gillibert, the commander, and having on board four small three-pound carriage-guns, solely for defense against piratical assaults, and being under convoy of a tender, furnished by Toussaint. That on the 23d of April, she was run ashore, a few miles to the westward of Port au Prince, within the dominion, jurisdiction and territory of General Toussaint, so that she was fast and tight aground; at which time, and in which situation, the boats and crew of the *Trumbull* attacked and took possession of her, and got her off. That Toussaint then was, and still is, on terms of amity, commerce and friendship with the United States, duly entered into and ratified by treaty. That the schooner was on a lawful voyage, for the sole purpose of trade; and not commissioned, or in a condition to annoy or injure the trade or commerce of the United States.

afterwards bring her into port, as set forth in the libel. That at the time of the capture of the said schooner, there were ten persons aboard her. That she was then armed with four carriage-guns, being four-pounders, with four swivel-guns, six muskets, four pistols, four cutlasses, two axes, some boarding-hatchets, tomahawks and handcuffs. That she was a trading French vessel of about a hundred tons, then laden with coffee, sugar and other merchandise. That she had come from Bordeaux to Port au Prince, where the claimant had taken in said cargo, and from whence he sailed, on or about the said 23d day of April, with said schooner and cargo, having dispatches from General Toussaint for the French Government. That the said Buisson sailed from Port au Prince as aforesaid, with the permission and direction of General Toussaint, to proceed to Bordeaux; that said schooner so sailed from Port au Prince, under convoy of an armed vessel, by order of said Toussaint, without a passport from Mr. Stevens, consul-general of the United States at St. Domingo, but that Buisson had been promised by Toussaint's brother, that one should be obtained and sent him, which, however, was not done; that said schooner had sailed from Bordeaux for Port au Prince, with fifteen men, besides eight passengers (according to the roll of equipage), armed with some guns, swivels and muskets; that said Captain Buisson was without any commission as for a vessel of war, and alleges that he was armed only for self-defense. That at the time of said capture, the guns of said schooner were loaded with canister-shot, one of which being fired, the shot fell near the bow of the *Trumbull*; but the said Buisson declares that said gun was fired only as a signal to his convoy. That the said Captain Buisson appeared to be in a disposition, and was prepared with force, to resist the boats which were sent from the *Trumbull* to board him, a little previous to the capture, in case of their attempting it; and that the said schooner and cargo are French property.

Upon these facts, the court is of opinion as follows, viz.: However compassion may be moved in favor of the claimant by some circumstances; such as that he was charged with dispatches from General Toussaint, between whom and the United States there were some friendly arrangements respecting commerce; that he was not in a capacity of greatly annoying trade, from the fewness of his men; and his allegation that he was armed only in defense; yet as the court is bound by law, which makes no such distinctions; as armed French vessels are not protected by any treaty or convention; particularly, not by the regulations between General Toussaint and the American consul; and as the said schooner *Peggy* was in a condition capable of annoying, and even of capturing single unarmed trading vessels, unattended with convoy; the court can not avoid being of opinion, that she falls within the

description and general design of the expression of the law, an armed French vessel.

2d. That she was captured on the high seas: the argument taken by the claimant's counsel, from the extent of national jurisdiction on seacoasts bordering on the country, not applying to this case, so as to acquit the said schooner; the seacoast of St. Domingo not being neutral; not made so by any treaty or convention; but to be considered as hostile, upon our present plan of laws of defense with respect to France; as much so as any part of the coast of France, as far as regards French armed vessels; the court is, therefore, of opinion that the said schooner *Peggy* and cargo are lawful prize:

It is, therefore, considered, decreed and adjudged by this court, that the decree of the district court respecting the same, so far as regards their acquittal, be, and the same is hereby reversed; and that the said schooner, with her apparel, guns and appurtenances, and the goods and effects which were found on board of her at the time of capture, and brought into port as aforesaid, be, and the same are hereby condemned as forfeited to the use of the United States, and of the officers and men of the said armed vessel called the *Trumbull*, one-half thereof to the United States, the other half to the officers and men, to be divided according to law; the said schooner *Peggy* being of inferior force to the said armed vessel called the *Trumbull*.

This sentence and decree were pronounced on the 23d day of September, 1800.

During the present term, and before the court gave judgment upon this writ of error, viz., on the 21st of December, 1801, the convention with France was finally ratified by the President; the fourth article of which convention has these words: "Property captured, and not yet *definitively* condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted), shall be mutually restored." "This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned, contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for."

On the 30th of September, 1800, this convention was signed by the respective plenipotentiaries of the two nations, at Paris. On the 18th of February, 1801, it was ratified by the President of the United States, with the advice and consent of the Senate, excepting the 2d

article, and with a limitation of the duration of the convention to the term of eight years. On the 31st of July, 1801, the ratifications were exchanged at Paris, with a proviso that the expunging of the 2d article should be considered as a renunciation of the respective pretensions which were the object of that article.

This proviso being considered by the President as requiring a renewal of the assent of the Senate, he sent it to them for their advice. They returned it, with a resolve that they considered the convention as fully ratified. Whereupon, on the 21st of December, 1801, it was promulged by a proclamation of the President.

The controversy turned principally upon two points: 1st. Whether the capture could be considered as made on the high seas, according to the import of that term, as used in the Act of Congress of July 9th, 1798 (1 U. S. Stat. 578). 2d. Whether, by the sentence of condemnation, by the circuit court, on the 23d of September, 1800, the schooner *Peggy* could be considered as *definitively* condemned, within the meaning of the 4th article of the convention with France, signed at Paris, on the 30th of September, 1800. The writ of error was dated on the 2d of October, 1800.

Griswold and *Bayard*, for the captors.

Mason, for the claimant.¹

The Chief Justice delivered the opinion of the court.—In this case, the court is of opinion that the schooner *Peggy* is within the provisions of the treaty entered into with France, and ought to be restored. This vessel is not considered as being *definitively* condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore, its condemnation is definitive, in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final, in the court which pronounces it, and receives its appellation from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order, subject to the future control of the same court. The last decree of an inferior court is final, in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual con-

¹I regret that not having the notes of this case, I am unable to report the very ingenious arguments of the learned counsel.

dition of the property, and to direct a restoration of that which is still in controversy between the parties. On any other construction, the word *definitive* would be rendered useless and inoperative. Vessels are seldom, if ever, condemned, but by a final sentence: an interlocutory order for a sale is not a condemnation. A stipulation, then, for the restoration of vessels, not yet condemned, would, on this construction, comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controversy between the parties, and the other leaves that controversy still depending. In this case, the sentence of condemnation was appealed from; it might have been reversed, and therefore, was not such a sentence as, in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

It has been urged, that the court can take no notice of the stipulation for the restoration of property not yet definitely condemned; that the judges can only inquire whether the sentence was erroneous, when delivered, and that if the judgment was correct, it can not be made otherwise, by anything subsequent to its rendition. The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true, that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and therefore, whatever the decision of this court may be, relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress; and although restoration may be an executive, when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision

of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which can not be affirmed, but in violation of law, the judgment must be set aside.

ALEXANDER MURRAY, Esq., v. SCHOONER *CHARMING BETSY*¹

Marine trespass.—Probable cause.—Damages.—Expatriation.—Armed vessel

An American vessel, sold in a Danish island, to a person who was born in the United States, but who had *bona fide* become a burgher of that island, and sailing from thence to a French island, in June, 1800, with a new cargo purchased by her new owner, and under the Danish flag, was not liable to seizure, under the non-intercourse law of February 27, 1800.

If there was no reasonable ground of suspicion that she was a vessel trading contrary to that law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.

The report of assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum, without explanation.

An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicil; and by making himself the subject of a foreign power, he places himself out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance.

¹U. S. Supr. Court, 1804, 2 Cranch, 64.

Quaere? Whether a citizen of the United States can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law?

Whether, by becoming the subject of a foreign power, he is freed from punishment for a crime against the United States?

What degree of arming constitutes an armed vessel?

The facts of this case are thus stated by the District Judge in his decree.

The libel in this cause is founded on the act entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof" (27th February, 1800, 2 U. S. Stat. 7) ; and states that the schooner (*The Charming Betsy*) sailed from Baltimore, after the passing of that act, owned, hired or employed by persons resident within the United States, or by citizens thereof, resident elsewhere, bound to Guadeloupe, and was taken on the high seas, on the 1st of June, 1800, by the libellant, then commander of the public armed ship the *Constellation*, in pursuance of instructions given to the libellant, by the President of the United States, there being reason to suspect her to be engaged in a traffic or commerce contrary to the said act, etc. The claim and answer, replication and rejoinder, are referred to for a further statement of the proceedings in this case, on all which I ground my decree. On a careful attention to the exhibits and testimony in this cause, and after hearing of counsel, I am of opinion that the following facts are either acknowledged in the proceedings, or satisfactorily proved.

That on or about the 10th of April, 1800, the schooner, now called *The Charming Betsy*, but then called the *Jane*, sailed from Baltimore, in the district of Maryland, an American bottom, duly registered according to law, belonging to citizens of, and resident in, the United States, and regularly documented with American papers ; that she was laden with a cargo belonging to citizens of the United States ; that her destination was first to St. Bartholomew, where the master had orders to effect a sale of both vessel and cargo ; but if a sale of the schooner could not be effected at St. Bartholomew, which was to be considered the "primary object" of the voyage, the master was to proceed to St. Thomas, with the vessel and such part of the flour as should be unsold, where he was to accomplish the sale. That although a sale of the cargo, consisting chiefly of flour, was effected at St. Bartholomew, yet the vessel could not there be advantageously disposed of, and the master proceeded, according to his instructions, to St. Thomas, where a *bona fide* sale was accomplished, by Captain James Phillips, on behalf of the American owners, for a valuable considera-

tion, to a certain Jared Shattuck, a resident merchant in the island of St. Thomas.

That although it is granted that Jared Shattuck was born in Connecticut, before the American revolution, yet he had removed, long before any differences with France in his early youth, to the island of St. Thomas, where he served his apprenticeship, intermarried, opened a house of trade, owned sundry vessels, and, as it is said, lands; which none but Danish subjects were competent to hold and possess. About the year 1796, he became a Danish burgher, invested with the privileges of a Danish subject, and owing allegiance to his Danish majesty. The evidence on this head is sufficient to satisfy me of these facts; though some of them might be more fully proved. It does not appear, that Jared Shattuck ever returned to the United States to resume citizenship, but constantly resided, and had his domicil, both before and at the time of the purchase of the schooner *Jane*, at St. Thomas. That although the schooner was armed and furnished with ammunition, on her sailing from Baltimore, and the cannon, arms and stores were sold to Jared Shattuck by a contract separate from that of the vessel, she was chiefly dismantled of these articles at St. Thomas, a small part of the ammunition, and a trifling part of the small arms excepted. That the name of the said schooner was at St. Thomas changed to that of *The Charming Betsy*, and she was documented with Danish papers, as the property of Jared Shattuck. That so being the *bona fide* property of Jared Shattuck, she took in a cargo belonging to him, and no other, as appears by the papers found on board, and delivered to this court.

That she sailed, with the said cargo, from St. Thomas, on or about the 25th day of June, 1800, commanded by a certain Thomas Wright, a Danish burgher, and navigated according to the laws of Denmark, for aught that appears to the contrary, bound to the island of Guadeloupe.

That on or about the first of July last, 1800, she was captured, on her passage to Guadeloupe, by a French privateer, and a prize-master and seven or eight hands put on board; the Danish crew (except Captain Wright, an old man and two boys) being taken off by the French privateer. That on the 3d of the same July, she was boarded and taken possession of by some of the officers and crew of the *Constellation*, under the orders of Captain Murray, and sent into the port of St. Pierre, in Martinique, where she arrived on the 5th of the same month of July. I do not state the contents of a paper called a *procès verbal*, which, however, will appear among the exhibits, because, in my opinion, it contains statements, either contrary to the real facts, or illusory, and calculated to serve the purposes of the French captors. Nor do I detail the number of cutlasses, a musket and a small quantity of ammunition found on board, when the schooner was boarded by

Captain Murray's orders. The Danish papers were on board, and, except the *procès verbal*, formed by the French captors, no other ship's papers. The instructions of Captain Murray from the President of the United States comprehend the case of a vessel found in the possession of French captors, but then it should seem, that it must be a vessel belonging to citizens of the United States. It does not appear that Captain Murray had any knowledge of Jared Shattuck being a native of Connecticut, or of any of the United States, until he was informed by Captain Wright, at Martinique.

It is unnecessary to go into any disquisition about the instructions to the commanders of public armed ships, whether they were directory to Captain Murray in the case in question; and if so, whether they were, or not, strictly conformable to law, does not finally justify an act which, on investigation, turns out to be illegal, either as it respects the municipal laws of our country or the laws of nations. Captain Murray's respectable character, both as an officer and a citizen forbids any idea of his intention to do a wanton act of violence towards either a citizen of the United States, or a subject of another nation. He, no doubt, thought it his duty to send the vessel in question to the United States for adjudication. He had also reasons prevailing with him, to sell Jared Shattuck's cargo in Martinique. His sending the schooner to Martinique was evidently proper, and serviceable to the owner, as she had not a sufficient number of the crew on board to navigate her. But the further proceeding turns out, in my opinion, wrong. Whatever probable cause might appear to Captain Murray to justify his conduct, or excite suspicion at the time, he ran the risk of, and is amenable for, consequences.

On a full consideration of the facts and circumstances of this case, I am of opinion that the schooner *Jane*, being the same in the libel mentioned, did not sail from the United States with an intent to violate the act, for a breach whereof the libel is filed. That she did not belong when she sailed from St. Thomas for Guadeloupe, to a citizen of the United States, but to a Danish subject. Jared Shattuck either never was a citizen of the United States, under our present national arrangement, or, if he should at any time have been so considered, he had lawfully expatriated himself, and became a subject of a friendly nation. No fraudulent intent appears in his case, either of eluding the laws of the United States, in carrying on a covered trade, by such expatriation, or that he became a Danish burgher for any purposes which are considered as exceptions to the general rule which seems established on the subject of the right of expatriation. That, being a Danish burgher and subject, he had a lawful right to trade to the island of Guadeloupe, any law of the United States notwithstanding, in a vessel *bona fide* purchased, either from citizens of the United States, or any other vessel documented and adopted

by the Danish laws. I do not rely more than it deserves, on the circumstance of Jared Shattuck's burghership of which the best evidence, to-wit, the brief, or an authenticated copy, has not been produced. I know well, that this brief alone, unaccompanied by the strong ingredients in his case, might be fallacious. I take the whole combination to satisfy me of his being *bona fide* a Danish adopted subject; and altogether it amounts, in my mind, to proof of expatriation.

The master (Wright) produces his Danish burgher's brief. He is a native of Scotland. But even the British case of *Pollard v. Bell*, 8 T. R. 435, to which I have been referred, shows that, with all the inflexibility evidenced in the British code, on the point of expatriation, a vessel was held to be Danish property, if documented according to the Danish laws, though the master, who had obtained a Danish burgher's brief, was a Scotchman. It shows, too, that in the opinion of the British judges (who agree, on this point, with the general current of opinions of civilians and writers on general law), the municipal laws or ordinances of a country do not control the laws of nations. The British courts have gone great lengths to modify their ancient feudal law of allegiance, so as to moderate its rigor, and adapt it to the state of the modern world, which has become most generally commercial. They hold it to be clearly settled, that although a natural-born subject can not throw off his allegiance to the king, but is always amenable for criminal acts against it, yet for commercial purposes he may acquire the rights of a citizen of another country. (Com. Rep. 677, 689.) I cite British authorities because they have been peculiarly tenacious on this subject. Naturalization in this country may sometimes be a mere cover; so may, and, no doubt, frequently are, burghers' briefs. But the case of Shattuck is accompanied with so many corroborating circumstances, added to his brief, as to render it, if not incontrovertibly certain, at least, an unfortunate case on which to rest a dispute as to the general subject of expatriation. I am not disposed to treat lightly the attachment a citizen of the United States ought to bear to his country. There are circumstances in which a citizen ought not to expatriate himself. He never should be considered as having changed his allegiance, if mere temporary objects, fraudulent designs, or incomplete change of domicile, appear in proof. If there are any such in Shattuck's case, they do not appear, and therefore, I must take it for granted that they do not exist. That, therefore, the ultimate destruction of his voyage, and sale of his cargo, are illegal.

The vessel must be restored, and the amount of sales of the cargo paid to the claimant, or his lawful agent, together with costs, and such damages as shall be assessed by the clerk of this court, who is hereby directed to inquire into and report the amount thereof. And for this purpose, the clerk is directed to associate

with himself two intelligent merchants of this district, and duly inquire what damage Jared Shattuck, the owner of the schooner *Charming Betsy* and her cargo, hath sustained, by reason of the premises. Should it be the opinion of the clerk, and the assessors associated with him that the officers and crew of the *Constellation* benefited the owner of *The Charming Betsy*, by the rescue from the French captors, they should allow in the adjustment, reasonable compensation for this service.

(Signed) RICHARD PETERS.

28th April, 1801.

On the 15th of May following, upon the report of the clerk and assessors, a final decree was entered for \$20,594.16 damages, with costs. From this decree, the libellant appealed to the circuit court, who adjudged, "that the decree of the district court be affirmed, so far as it directs restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to the account exhibited by Captain Murray's agent, being one of the exhibits in this cause: and that the said decree be reversed for the residue, each party to pay his own costs, and one moiety of the custody and wharfage bills for keeping the vessel until restitution to the claimant." From this decree, both parties appealed to the supreme court.

The cause was argued, at last term, by *Martin, Key* and *Mason*, for the claimant. No counsel was present for the libellant.

For the *claimant* it was contended that the sale of the schooner to Shattuck was *bona fide*, and that he was a Danish subject. That although she was in possession of French mariners, she was not an armed French vessel, within the acts of congress, which authorized the capture of such vessels. That neutrals are not bound to take notice of hostilities between two nations, unless war has been declared: that the right of search and seizure is incident only to a state of war. That neutrals are not bound to take notice of our municipal regulations: that the non-intercourse act was simply a municipal regulation, binding only upon our own citizens, and had nothing to do with the law of nations; it could give no right to search a neutral. That in all cases where a seizure is made under a municipal law, probable cause is no justification, unless it is made so by the municipal law under which the seizure is made.

As to the position that the sale was *bona fide*, the counsel for the claimant relied on the evidence, which came up with the transcript of

the record, which was very strong and satisfactory. Upon the question whether Shattuck was a Danish subject, or a citizen of the United States, it was said that although he was born in Connecticut, yet there was no evidence that he had ever resided in the United States, since their separation from Great Britain. But it appears by the testimony that he resided in St. Thomas, during his minority, and served his apprenticeship there. That he had married into a family in that island; had resided there ever since the year 1789; had complied with the laws which enabled him to become a burgher, and had carried on business as such, and had for some years, been the owner of vessels and lands. Even if, by birth, he had been a citizen of the United States, he had a right to expatriate himself. He had, at least, the whole time of his minority in which to make his election of what country he would become a citizen. Every citizen of the United States has a right to expatriate himself and become a citizen of any other country which he may prefer, if it be done with a *bona fide* and honest intention, at a proper time, and in a public manner. While we are inviting all the people of the earth to become citizens of the United States, it surely does not become us to hold a contrary doctrine, and deny a similar choice to our own citizens. Circumstances may, indeed, show the intention to be fraudulent and collusive, and merely for the purpose of illicit trade, etc. But such circumstances do not appear in the present case. Shattuck was fairly and *bona fide* domiciliated at St. Thomas before our disputes arose with France. The act of Congress, "further to suspend," etc., can not, therefore, be considered as operating upon such a person. The first act to suspend the intercourse was passed on the 13th of June, 1798 (1 U. S. Stat. 565), and expired with the end of the next session of Congress. The next act, "further to suspend," etc., was passed on the 9th of February, 1799 (*ibid.* 613), and expired on the 3d of March, 1800. The act upon which the present libel is founded, and which has the same title with the last, was passed on the 27th of February, 1800 (2 *ibid.* 7). All the acts are confined in their operations to persons resident within the United States, or under their protection.

She was not such an armed French vessel as comes within the description of those acts of Congress, which authorized the hostilities with France. She had only one musket, twelve ounces of powder, and twelve ounces of lead. The only evidence of other arms arises from the deposition of one McFarlan. But he did not go on board of her

until some days after the capture, and his deposition is inadmissible testimony, because he was entitled to a share of the prize-money, if the vessel should be condemned; and although a release from him to Captain Murray appears among the papers, yet that release was not made, until after the deposition was taken; and the fact is expressly contradicted by other testimony. The mere possession, by nine Frenchmen, did not constitute her an armed vessel. She was unable to annoy the commerce of the United States, which was the reason of the adjudication of this court, in the case of *The Amelia*. (See *Talbot v. Seeman*, 1 Cr. 1.) The *procès verbal* is no evidence of any fact but its own existence. If she had arms, they ought to have been brought in, as the only competent evidence of that fact. No arms are libelled, and none appear, by the account of sales, to have been sold in Martinique.

It being, then, a neutral unarmed vessel, Captain Murray had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace, the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.

The decrees of both the courts below have decided that the vessel was not liable to capture. The only question is, whether the claimant is entitled to damages? Captain Murray has libelled her upon the non-intercourse act. He does not state that he seized her, because she was a French armed vessel, although he states her to be armed, at the time of capture. It has also been decided by both the courts that she is Danish property. If an American vessel had been illegally captured by Captain Murray, he would have been liable for damages; *a fortiori* in the case of a foreign vessel where, from motives of public policy, our conduct ought not only to be just but liberal.

In cases of personal arrest, if no crime has in fact been committed, probable cause is not a justification, unless it be made so by municipal law. As in the case of hue and cry, he who raises it is liable, if it be false. If the sheriff has a writ against A, and B is shown to him as the person, and he arrests B instead of A, he is liable to an action of trespass at the suit of B. (*Wale v. Hill*, 1 Bulst. 149.) So, if he replevies wrong goods, or takes the goods of one, upon a *fi. fa.* against another. In these cases, it is no justification to the officer, that he was informed, or believed, he was right. He must in all cases seize at his peril. So it is with all other officers, such as those of the revenue,

etc., probable cause is not sufficient to justify, unless the law makes it a justification. If the information is at common law, for the thing seized, and the seizure is found to have been illegally made, the injured party must bring his action of trespass; but by the course of the admiralty, the captor, being in court, is liable to a decree against him for damages. *The Fabius*, 2 Rob., 202. The case of *Wale v. Hill*, in 1 Bulst. 149, shows that where a crime has not been committed, there, probable cause can be no justification. But where a crime has been committed, the party arresting can not justify by the suspicion of others; it must be upon his own suspicion.

In the case of *Papillon v. Buckner*, Hardr. 478, although the goods seized had been condemned by the commissioners of excise, yet it was not held to be a good justification. In *Purviance v. Angus*, 1 Dall. 182, it was held that an error in judgment would not excuse an illegal capture; and in *Leglise v. Champante*, 2 Str. 820, it is adjudged that probable cause of seizure will not justify the officer.¹

In 3 Anstr. 896, is a case of seizure of hides, where no provision was made in the law that probable cause should be a justification. This case cites *Pickering v. Truste*, 7 T. R. 53. For what reason do the revenue laws provide that probable cause shall be a justification, if it would be so, without such a provision? In these cases, the injury by improper seizures can be but small compared with those which might arise under the non-intercourse law. Great Britain has never made probable cause an excuse for seizing a neutral vessel for violating her municipal laws. A neutral vessel is only liable to your municipal regulations, while in your territorial jurisdiction; but as soon as she gets to sea, you have lost your remedy: you can not seize her on the high seas. Even in Great Britain, if a vessel gets out of the jurisdiction of one court of admiralty, she can not be seized in another. It is admitted that a law may be passed authorizing such a seizure, but

¹The Ch. J. observed, that this case was overruled two years afterwards, in a case cited in a note to Gwillim's edition of Bac. ab.² The case cited in the note is from 12 Vin. 173. Tit. evidence. P. b. 6. in which it is said "that Lord Ch. Baron Bury, *Montague and Page*, against *Price*, held that where an officer had made a seizure, and there was an information upon it, etc., which went in favour of the party who afterwards brings trespass; the shewing these proceedings was sufficient to excuse the officer: It was competent to make out a probable cause for his doing the act. Mich. 6. Geo."

²The case of *Leglise v. Champante* was in 2 Geo. 2. That cited in the note to Bac. ab. referred to by the Ch. J. was in 6 Geo. 1. The mistake arises from the note in Gwillim's edition not mentioning the date of the case cited from *Viner*.

then it becomes a question between the two nations. If the present circumstances are sufficient to raise a probable cause for the seizure, and if such probable cause is a justification, it will destroy the trade of the Danish islands. The inhabitants speak our language, they buy our ships, etc. It will be highly injurious to the interests of the United States; and this court will consider what cause of complaint it would furnish to the Danish nation. If a private armed vessel had made this seizure, the captain and owners would have been clearly liable on their bond, which the law obliges them to give. The object of this act of Congress was more to prevent our vessels falling into the hands of the French than to make it a war measure, by starving the French islands.

Even if a Danish vessel should carry American papers and American colors, it would be no justification. In a state of peace, we have no right to say they shall not use them, if they please. In time of war, double papers, or throwing over papers, are probable causes of seizure, but this does not alter the property; it is no cause of condemnation. The vessel is to be restored, but without damages. -

The mode of ascertaining the damages adopted by the district court, is conformable to the usual practice in courts of admiralty. See *Mariott's Rep.*, and in the same book, p. 184, in the case of *The Vanderlee*, liberal damages were given.

In the revenue laws of the United States, vol. 4, p. 391, probable cause is made an excuse for the seizure; but no such provision is, or ought to have been, made in the non-intercourse law. The powers given were so liable to abuse that the commander ought to act at his peril.

The Chief Justice mentioned the case of *The Sally*, Captain Joy, in 2 Rob. 185 (Amer. edit.), where a court of vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure.

This cause came on again to be argued, at this term, by *Dallas*, for the libellant, and *Martin* and *Key*, for the claimant.

Dallas, as a preliminary remark, observed, that the judge of the district court had referred to the clerk and his associates to ascertain whether any and what salvage should be allowed. This was an improper delegation of his authority, not warranted by the practice of courts of admiralty, nor by the nature of his office. Although they had not reported upon this point, yet he submitted it to the court for their consideration.

After stating the facts which appeared upon the record, and such as were either admitted or proved, he divided his argument into three general points.

1. That Jared Shattuck was a citizen of the United States at the time of capture and recapture; and therefore, the vessel was subject to seizure and condemnation, under the act of Congress usually called the non-intercourse act.

2. That she was in danger of condemnation by the French, and therefore, if not liable to condemnation under the act of Congress, Captain Murray was at least entitled to salvage.

3. That if neither of the two former positions can be maintained, yet Captain Murray had probable cause to seize and bring her in, and therefore, he ought not to be decreed to pay damages.

I. The vessel was liable to seizure and condemnation under the non-intercourse act; Shattuck being a citizen of the United States at the time of recapture. Captain Murray's authority to capture *The Charming Betsy* depends upon the municipal laws of the United States, expounded by his instructions, and the law of nations. Before the non-intercourse act, measures had been taken by Congress to prevent and repel the injuries to our commerce which were daily perpetrated by French cruisers. By the act of 28th May, 1798 (1 U. S. Stat. 561), authority was given to capture "armed vessels sailing under authority, or pretense of authority, from the republic of France," etc., and to retake any captured American vessel. The act of 28th June, 1798 (*ibid.* 574), regulates the proceedings against such vessels, when captured, ascertains the rate of salvage for vessels recaptured, and provides for the confinement of prisoners, etc. The act of July 9th, 1798 (*ibid.* 578), authorizes the capture of armed French vessels anywhere upon the high seas, and provides for the granting commissions to private armed vessels, etc.

The right to retake an armed or unarmed neutral vessel, in the hands of the French, is nowhere expressly given; but is an incident growing out of the state of war; and is implied in several acts of Congress. This was decided in the case of *Talbot v. Seeman*, in this court, at August term, 1801 (1 Cr. 33). The right of recapture, carrying with it the right of salvage, gave the right of bringing into port; and that port must be a port of the captor.

The first non-intercourse act was passed June 13th, 1798 (1 U. S. Stat. 565); a similar act was passed February 9th, 1799 (*ibid.* 613).

The act upon which the present libel is founded was passed February 27th, 1800 (2 *ibid.* 7). These are not to be considered as mere municipal laws for the regulation of our own commerce, but as a part of the war measures which it was found necessary at that time to adopt. It was, *quoad hoc*, tantamount to a declaration of war.

Happily, there is not, and has not been, in the practice of our government, an established form of declaring war. Congress have the power, and may, by one general act, or by a variety of acts, place the nation in a state of war. So far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply. By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy. If authorities for this position were necessary, a variety of cases decided by Sir William Scott might be cited.

As to the present case, France was to be considered as our enemy. The non-intercourse act of 1800 prohibits all commercial intercourse "between any person or persons resident within the United States, or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof." And declares that "any ship or vessel, owned, hired or employed, in whole or in part, by any person or persons resident within the United States, or any citizen or citizens thereof, resident elsewhere," etc., "shall be forfeited, and may be seized and condemned." A citizen of the United States, resident "elsewhere," must mean a citizen resident in a neutral country. If Shattuck was such a citizen, the case is clearly within the statute. It is not necessary that the vessel should be registered as an American vessel; it is sufficient, if owned by a citizen of the United States: registering is only necessary to give the vessel the privileges of an American bottom. Nor is it necessary that she should have been built in the United States.

By the 8th section of the act of 27th February, 1800 (2 U. S. Stat. 10), reasonable suspicion is made a justification of seizure, and sending in for adjudication. The officer is bound to act upon suspicion, and that suspicion applies both to the character of the vessel, and to the nature of the voyage. Although the act of Congress mentions only vessels of the United States, still, from the nature of the case, the right to seize and send in must extend to apparent as well as real American vessels.

Such is the contemporaneous exposition given by the instructions

of the executive.¹ The words of these instructions are: "You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you." The law and the instructions having thus made it his duty to act on reasonable suspicion, he must be safe, though the ground of suspicion should eventually be removed.

Under our municipal law, therefore, the following propositions are maintainable: 1. That a vessel captured by the French, sails under French authority; and if armed, is, *quoad hoc*, a French armed vessel. The degree of arming is to be tested by the capacity to annoy the unarmed commerce of the United States. 2. The right to recapture an unarmed neutral is an incident of the war, and implied in the regulations of Congress. 3. The non-intercourse law justifies the seizure of apparent, as well as of real American vessels.

Nor does this doctrine militate with the law of nations. A war, in fact, existed between the United States and France. An army was raised, a navy equipped, treaties were annulled, the intercourse was prohibited, and commissions were granted to private armed vessels. Every instrument of war was employed; but its operation was confined to the vessels of war of France upon the high seas. So far as the war was allowed, the laws of war attached.

That it was a public war, was decided in the case of *Bas v. Tingy*, in this court, February term, 1800 (4 Dall. 37). No authorities are necessary to show that a state of war may exist without a public declaration. And the right to search follows the state of war. Vattel, lib. 3, c. 7, § 114; *The Maria*, 1 Rob. 304; *Garrels v. Kensington*, 8 T. R. 234. Whether the vessel was American or Danish, she was taken out of the hands of our enemy.

¹Upon Mr. Dallas's offering to read the instructions.

CHASE, J., said, he was always against reading the instructions of the executive; because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.

MARSHALL, Ch. J. I understand it to be admitted by both parties, that the instructions are part of the record. The construction, or the effect they are to have, will be the subject of further consideration. They may be read.

CHASE, J. I can only say, I am against it, and I wish it to be generally known. I think it a bad practice, and shall always give my voice against it.

The law of nations in war gives not only the right to search a neutral, but a right to recapture from the enemy. On this point, the case of *Talbot v. Seeman* is decisive, both as to the law of nations, and as to the acts of Congress, and that the rule applies as well to a partial as to a general war. Captain Murray's authority, then, was derived, not only from our municipal law, and his instructions, but from the law of nations. If he has pursued his authority in an honest and reasonable manner, although he may not be entitled to reward, yet he can not deserve punishment.

It remains to consider whether the vessel was, in fact, liable to seizure and condemnation. What were the general facts to create suspicion at the time? 1. The vessel was originally American. The transfer was recent, and since the non-intercourse law. The voyage was to a dependency of the French Republic, and therefore prohibited, if she was really an American vessel. 2. The owner was an American by birth. The master was a Scotchman. The crew were not Danes, but chiefly Americans, who came from Baltimore. 3. The *procès verbal* calls her an American vessel; which was corroborated by the declarations of some of the crew. 4. The practice of the inhabitants of the Danish islands to cover American property in such voyages.

What was there, then, to dispel the cloud of suspicion, raised by these circumstances? 1. The declarations of Wright, the master, whose testimony was interested, inconsistent with itself, and contradicted by others. 2. The documents found on board.

These were no other than would have been found, if fraud had been intended. These were, 1. The sea-letter or pass from the governor-general of the Danish islands, who did not reside at St. Thomas, but at St. Croix. It states only by way of recital that the vessel was the property of Jared Shattuck, a burgher and inhabitant of St. Thomas. It does not state that he was naturalized or a subject of Denmark. 2. The muster-roll, which states the names and number of the master and crew, who were ten besides the captain, viz., William Wright, master; David Weems, John Robinson, Jacob Davidson, John Lampey, John Nicholas, Frederick Jansey, George Williamson, William George, Prudentio, a Corsican, and Davy Johnson, a Norwegian. There is but one foreign name in the whole. Wright, in his deposition, says that three were Americans, one a Norwegian, and the rest were Danes, Dutch and Spaniards. The muster-roll was not on oath, but was the mere declaration of the owner. 3. The invoice, which only says that

Shattuck was the owner of the cargo. 4. The bill of lading, which says that he was the shipper. 5. The certificate of the oath of property of the cargo, states only by way of recital, that Shattuck, a burgher, inhabitant and subject, etc., was the owner of the cargo, but says nothing of the property in the vessel. By comparing this certificate with the oath itself, it appears that the word "subject" has been inserted by the officer, and was not in the original oath. 6. Shattuck's instructions to Captain Wright. 7. The bill of sale by Phillips, the agent of the American owners, to Shattuck; but his authority to make the sale was not on board.

To show what little credit such documents are entitled to, he cited the opinion of Sir W. Scott, in the case of *The Vigilantia*, 1 Rob. 6-8 (Amer. ed.), and in the case of *The Odin*, (*ibid.* 208-211). The whole evidence on board was a mere custom-house affair, all depending upon his own oath of property. His burgher's brief was not on board, nor did it appear, even by his own oath, that Shattuck was a burgher. And no document is yet produced in which he undertakes to swear that he is a Danish subject. Such documents could not remove a reasonable suspicion founded upon such strong facts. There could never be a seizure upon suspicion, if this was not warrantable at the time.

What has appeared since, to remove the suspicion, and to prove Shattuck to be a Danish subject? All the original facts remain, and the case rests on Shattuck's expatriation, whence arise two inquiries: 1. As to the right, in point of law, to expatriate. 2. As to the exercise of the right, in fact.

1. As to the right of expatriation. He was a native of Connecticut, and for aught that appears in the record, remained here until the year 1789, when we first hear of him in the island of St. Thomas. This was after the revolution, and therefore, there can be no question as to election, at least, there is no proof of his election to become a subject of Denmark.

If the account of the case of *Isaac Williams*, 1 Tuck. Bl., part 1, App. p. 436,¹ is correct, it was the opinion of Ch. J. Ellsworth, that a

¹The state of the case and the opinion of Ch. J. ELLSWORTH, as extracted by Judge Tucker, from "*The National Magazine*," No. 3, p. 254, are as follow.

On the trial of Isaac Williams in the *District (qu. Circuit?)* Court of Connecticut, Feb. 27, 1797, for accepting a commission under the French Republic, and under the authority thereof committing acts of hostility against Great Britain, the defendant alleged, and offered to prove, that he had expatriated himself from the United States and become a French citizen before the com-

citizen of the United States could not expatriate himself. That learned judge is reported to have said in that case, that the common law of this country remains the same as it was before the revolution. But in the case of *Talbot v. Jansen*, 3 Dall. 133, this court inclined to the opinion that the right exists, but the difficulty was, that the law had not pointed out the mode of election and of proof.

It must be admitted, that the right does exist, but its exercise must be accompanied by three circumstances: 1. Fitness in point of time. 2. Fairness of intent. 3. Publicity of the act.

But the right of expatriation has certain characteristics, which distinguish it from a locomotive right, or a right to change the domicil. By expatriation, the party ceases to be a citizen and becomes an alien. If he would again become a citizen, he must comply with the terms of the law of naturalization of the country, although he was a native.

mencement of the war between France and England. This produced a question as to the right of expatriation, when Judge ELLSWORTH, then Chief Justice of the United States, is said to have delivered an opinion to the following effect.

The common law of this country remains the same as it was before the revolution. The present question is to be decided by two great principles; one is, that all the members of a civil community are bound to each other by compact; the other is, that one of the parties to this compact can not dissolve it by his own act. The compact between our community and its members is, that the community shall protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community and faithful to its defense. It necessarily results that the member can not dissolve the compact without the consent, or default of the community. There has been no consent, no default. Express consent is not claimed; but it is argued that the consent of the community is implied, by its policy, its condition, and its acts. In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration; but our policy is different, for our country is but scarcely settled, and we have no inhabitants to spare. Consent has been argued from the condition of the country, because we are in a state of peace. But though we were in peace, the war had commenced in Europe; we wished to have nothing to do with the war—but the war would have something to do with us. It has been difficult for us to keep out of the war—the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities.

The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any, and at all times, renounce his own, and join himself to a foreign country.

Consent has been argued from the acts of our government permitting the naturalization of foreigners. When a foreigner presents himself here, we do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and folly are his own: but this implies no consent of the government that our own citizens should also expatriate themselves. It is therefore my opinion, that these facts which the prisoner offers to prove in his defense, are totally irrelevant, etc. The prisoner was accordingly found guilty, fined and imprisoned.

But by a mere removal to another country, for purposes of trade, whatever privileges he may acquire in that country, he does not cease to be a citizen of this.

With respect to other parties at war, the place of domicile determines his character, enemy or neutral, as to trade. But with respect to his own country, the change of place alone does not justify his trading with her enemy; and he is still subject to such of her laws as apply to citizens residing abroad. *The Hoop*, 1 Rob. 165; *Gist v. Mason*, 1 T. R. 84; and particularly *Potts v. Bell*, 8 *ibid.* 548, where this principle is advanced by Doct. Nicholl, the king's advocate, in p. 555, admitted by Doct. Swabey, in p. 561, and decided by the court.

This principle of general law is fortified by the positive prohibition of the act of Congress. In France, the character of French citizen remains, until a naturalization in a foreign country. In the United States, we require an oath of abjuration, before we admit a person to be naturalized. If he was naturalized, he has done an act disclaiming the protection of the United States, and is no longer bound to his allegiance. But if he has acquired only a special privilege to trade, it must be subject to the laws of his country.

2. But has he, in fact, exercised the right of expatriation? And is it proved by legal evidence? His birth is *prima facie* evidence that he is a citizen of the United States, and throws the burden of proof upon him. No law has been shown, by which he could be a naturalized subject of Denmark, nor has he himself ever pretended to be more than a burgher of St. Thomas. What is the character of a burgher, and what is the nature of a burgher's brief? It is said that to entitle a person to own ships, there must have been a previous residence; but no residence is necessary to enable a man to be a master of a Danish vessel. It is a mere license to trade; a permit to bear the flag of Denmark; like the freedom of a corporation. It implies neither expatriation, an oath of allegiance, nor residence. *The Argo*, 1 Rob. 133; *Pollard v. Bell*, 8 T. R. 434. These cases show with what facility a man may become a burgher; that it is a mere matter of purchase, and that it is a character which may be taken up and laid aside at pleasure, to answer the purposes of trade.

But there is no evidence that he ever obtained even this burgher's brief. He went from Connecticut, a lad, an apprentice or clerk, in 1788 or 1789: he was not seen in business there until 1795 or 1796. In going, in 1789, he had no motive to expatriate himself, as there

was then no war. We find him first trading in 1796, after the war, and the law of Denmark forbids a naturalization in time of war. At what time, then, did he become a burgher? If he ever did become such, in fact, and it was in time, he can prove it by the record. Wright's burgher's brief is produced, and shows that they are matters of record. The brief itself, then, or a copy from the record, duly authenticated, is the best evidence of the fact, and is in the power of the party to produce. Why is it withheld, and other *ex parte* evidence picked up there, and witnesses examined here? All the evidence they have produced is merely matter of inference. They have examined witnesses to prove that he carried on trade in St. Thomas, owned ships and land, married, and resided there. By the depositions, they prove that a man is not by law permitted to do these things, without being a burgher; and hence, they infer his burghership.

These facts are equivocal in themselves, and not well proved. Certificates of citizenship are easily obtained, but are not always true. This is noticed by Sir W. Scott, in the cases before cited. A case happened in this country, *United States v. Villato*, 2 Dall. 370; where a person having taken the oath of allegiance to Pennsylvania, agreeable to the naturalization act of that State, obtained a certificate from a magistrate, confirmed by the attestation of the supreme executive of the State, that he was a citizen of the United States. But upon a trial in the circuit court of Pennsylvania, it was adjudged that he was not a citizen. *Captain Barney* also went to France, became a citizen, took command of a French ship of war, returned to this country, and is now certified to be a citizen of the United States. So, in the case of the information against the ship *John and Alice*, Captain Whitesides, he was generally supposed to be a citizen of the United States. On the trial, evidence of his citizenship was called for, when it appeared that his father brought him into this country in the year 1784, and remained here until 1792, when the father died. Neither he nor his father were naturalized, and the vessel was condemned. These instances show the danger of crediting such custom-house certificates.

All these certificates, in the present case, do not form the best evidence, because better is still in the possession of the party, and he ought to produce it. The general and fundamental rules of evidence are the same in courts of admiralty, as in courts of common law. If they appear to relax, it is only in that stage of the business where they are obliged to act upon suspicion. In the present case, the opinion of

merchants only is taken as to the laws of Denmark. No judicial character, not even a lawyer, was applied to. Certificates of merchants are no evidence of the law. *The Santa Cruz*, 1 Rob. 58. The evidence offered is both *ex parte* and *ex post facto*. Fraud is not to be presumed, but why was not the burgher's brief produced, as well as the other papers, such as the oath of property, etc., when it was certainly the most important paper in the case? The only reason which can be given is that it did not exist. It was a case like that of Captain Whitesides, where people were led into a mistake from the length of his residence, and from having seen him there from the time of his youth.

Upon the whole, then, we have a right to conclude that Jared Shattuck was not a Danish subject; or that if he was, the fact is not proved, and therefore he remains a citizen of the United States, in the words of the act of Congress, "residing elsewhere." The consequence must be a condemnation of the vessel.

II. She was in danger of condemnation in the French courts of admiralty, and therefore Captain Murray is entitled to salvage. This depends: 1. On the right to retake; 2. On the degree of danger; and 3. The service rendered.

1. He had a right to retake, on the ground of suspicion of illicit trade, in violation of the non-intercourse law, as well as on the ground of her being a vessel sailing under French authority, and so armed as to be able to annoy unarmed American vessels. He had also a right to bring her in for salvage, if a service was rendered. If his right to retake depends upon the suspicion of illicit trade, or upon her being a French armed vessel, he could take her only into a port of the United States.

The point of illicit trade has already been discussed. That the vessel was sailing under French authority is certain; the only question is, whether she was capable of annoying our commerce. She had port-holes, a musket, powder and balls, and eight Frenchmen, who, probably, as is usual, had each a cutlass. Vessels have been captured, without a single musket; three or four cutlasses are often found sufficient. The vessel was sufficiently armed to justify Captain Murray, under his instructions, in bringing her in.

If, then, the taking was lawful, has she been saved from such danger as to entitle Captain Murray to salvage? There is evidence that Captain Wright requested Captain Murray to take the vessel, to prevent her falling into the hands of the English. He consented to be carried

into Martinique. He protested only against the privateer, not against Captain Murray. His letter to Captain Murray does not complain of the recapture, but of the detention. The taking was an act of humanity, for if Captain Murray had taken out the Frenchmen, and left the vessel with only Captain Wright and the boy, they could not have navigated her into port, and she must have been lost at sea, or fallen a prey to the brigands of the islands. This alone was a service which ought to be rewarded with salvage.

But she was in danger of condemnation in the French courts of admiralty. The case of *Talbot v. Seeman* has confirmed the principle adopted by Sir W. Scott, in the case of *The War Onskan*, 2 Rob. 246, that the departure of France from the general principles of the law of nations, varied the rule that salvage is not due for the recapture of a neutral out of the hands of her friend; and that the general conduct of France was such as to render the recapture of a neutral out of her hands, an essential service, which would entitle the recaptors to salvage. If she had been carried into a French port, how unequal would have been the conflict? Who would have been believed, the privateer or the claimant? The Danish papers would have been considered only as a cover for American property. The danger is shown by the apprehensions of Captain Wright and his crew; by the declarations of the privateer; by the *procès verbal*; and by the actual imprisonment of the crew.

But, independent of the general misconduct of France, there are several French ordinances under which she might have been condemned. The case of *Pollard v. Bell*, 8 T. R. 444, shows that such ordinances may justify the condemnation. The case of *Bernardi v. Motteux*, 2 Doug. 575, shows that the French courts actually do proceed to condemnation upon them, as in the case of throwing over papers, etc. So, in the case of *Mayne v. Walter*, Park on Insurance, 414 (363), the condemnation was because the vessel had an English supercargo on board.

By the ordinances of France, *Code des Prises*, vol. 1, p. 306, § 9, "all foreign vessels shall be good prize in which there shall be a supercargo, commissary or chief officer of an enemy's country; or the crew of which shall be composed of one-third sailors of an enemy's state; or which shall not have on board the *rôles d'équipage* certified by the public officers of the neutral places from whence the vessels shall have sailed." And by another ordinance, 1 *Code des Prises*, 303, §

6, "No regard is to be paid to the passports granted by neutral or allied powers, to the owners or masters of vessels, subjects of the enemy, if they have not been naturalized, or if they shall have not transferred their domicil to the states of the said powers, three months before the 1st of September, in the present year; nor shall the said owners or masters of vessels, subjects of the enemy, who shall have obtained such letters of naturalization, enjoy their effect, if, after they shall have obtained them, they shall return to the states of the enemy, for the purpose of their continuing their commerce;" and by the next article, "vessels, enemy built, or which shall have been owned by an enemy, shall not be reputed neutral or allied, if there are not found on board authentic documents, executed before public officers, who can certify their date, and prove that the sale or transfer thereof had been made to some of the subjects of an allied or neutral power, before the commencement of hostilities; and if the said deed or transfer of the property of an enemy to the subject of the neutral or ally, shall not have been duly enregistered before the principal officer of the place of departure, and signed by the owner, or the person by him authorized."

In violation of these ordinances, the chief officer, Captain Wright, was a Scot, an enemy to France: for although he had a burgher's brief, yet it did not appear, that he had resided three months before he obtained it; and we have before seen, that a previous residence was not necessary, by the laws of Denmark, to entitle him to a burgher's brief, for the purpose of being master of a vessel. In the next place, the whole number of the crew, with the master, being eleven, and three of the crew being Americans and the master a Scot, more than one-third of the crew were enemies of France. The muster-roll did not describe the place of nativity of the crew. The vessel was purchased after the commencement of hostilities between France and the United States. And there was no authority on board from the American owners to Phillips, the agent who made the sale, in violation of the regulation of 17th February, 1794, art. 4 (2 *Code des Prises*, p. 14), which declares "the vessel to be good prize, if being enemy built, or belonging originally to the enemy, the neutral, the allied, or the French proprietor, shall not be able to show, by authentic documents, found on board, that he had acquired his right to her before the declaration of war." See also 2 Valin, 249, § 9; 251, § 12, and 244.

What chance of escape had this vessel, under all these ordinances, which the French courts were bound to enforce? The case of *Pollard*

v. *Bell*, 8 T. R. 434, is precisely in point. The vessel in that case was Danish, and had all the papers usually carried by Danish vessels. But she was condemned in the highest court of appeal in France, because the master was a Scot, who had obtained a Danish burgher's brief, subsequent to the hostilities. Has there, then, been no service rendered?

It is no objection to the claim of salvage, that it is not made in the libel. Salvage is a condemnation of part of the thing saved. The prayer for condemnation of the whole includes the part: it may be made by petition, or even *ore tenus*.

The means used for saving need not be used with that sole view. *Talbot v. Seeman*. As to the *quantum* of salvage, he referred to the opinion of Sir W. Scott, in the case of *The Sarah*, 1 Rob. 263.

III. But if *The Charming Betsy* is not liable to condemnation, under the non-intercourse law, and if Captain Murray is not entitled to salvage, yet the restitution ought to be made of the net proceeds of the sale only, and not with damages and costs.

In maritime cases, probable cause is always a justification. The grounds of suspicion, in the present instance, have been already mentioned; and when to these are added the circumstances, that it was at Captain Wright's request that Captain Murray took possession of the vessel; that he consented to be carried into Martinique; that if he had taken out the Frenchmen, and left the vessel in the midst of the ocean, with only Captain Wright and his boy, they would have been left to destruction; that part of the cargo was damaged, part rifled, and all perishable; and that Captain Murray offered to release the vessel and cargo, on security, there can hardly be a stronger case to save him from a decree for damages.

In the case of the *Two Susannahs*, 2 Rob. 110, it is, by Sir W. Scott, taken as a principle, that a seizure is justified by an order for further proof, and he decreed a restitution of the proceeds only, it not being shown that the captors conducted themselves otherwise than with fair intentions. In the present case, there is no pretense that Captain Murray did not act from the purest motives, and from a wish faithfully to execute his instructions.

Key, contra.—1. The schooner *Charming Betsy* and her cargo were neutral property, and not liable to capture under the non-intercourse law. 2. When recaptured, she was not an armed French ves-

sel capable of annoying our commerce, and therefore not liable under the acts of Congress authorizing the capture of such vessels. 3. She was not in imminent danger when recaptured, and therefore Captain Murray is not entitled to salvage. 4. Under all the circumstances of the case, he acted illegally, and is liable for damages which have been properly assessed.

I. As to the neutral character of the vessel and cargo, he contended: 1. That Jared Shattuck never was an American citizen. 2. That if he was, he had expatriated himself, and had become a Danish subject. 3. That if not a Danish subject, yet he was not a citizen of the United States.

1. The evidence is that he was born in Connecticut, but before the Declaration of Independence, and was, therefore, a natural-born subject of Great Britain. He was in trade for himself, in St. Thomas, in 1794. This he could not do until he was twenty-one years of age, which will carry back the date of his birth to the year 1773. He was an apprentice at St. Thomas in the year 1788 or 1789. There is no evidence of his being in the United States since the Declaration of Independence. But if he had been, yet he went away while a minor, and he could not make his election during his minority. There is no evidence that his parents were citizens of the United States. Being a natural-born subject of Great Britain, he could not become a citizen of the United States, unless he was here at the time of the revolution, or his parents were citizens, or unless he became naturalized according to law. It is incumbent upon Captain Murray to prove him to be a citizen of the United States. It is sufficient for us to show that he was born a subject of Great Britain. They must show how he became a citizen. This is a highly penal law, and everything must be proved which is necessary to bring the case within the penalty.

2. But if he ever was a citizen of the United States, he had expatriated himself. That every man has a right to expatriate himself, is admitted by all the writers upon general law; and it is a principle peculiarly congenial to those upon which our constitutions are founded. Some of the States of the Union have expressly recognized the right, and even prescribed the form of expatriation. But where the form is not prescribed, nothing more is necessary than that it be accompanied with fairness of intention, fitness of time, and publicity of election.

In the present instance, all these circumstances concur. No time could have been more fit than the year 1788 or 1789, when all Europe

and America were in a state of profound peace. His country had then no claim to his service. The fairness of intention is evidenced by its having been carried into effect by an actual *bona fide* residence of ten or eleven years; by serving an apprenticeship; by actual domiciliation; by marriage; by becoming a burgher; by acquiring lands, and by owning ships. The publicity of election is witnessed by the same acts, and by taking the oath of allegiance to Denmark. The United States have prescribed no form of expatriation. All that he could do to render the act public and notorious has been done.

It is said a man can not cease to be a citizen of one state, until he has become a citizen or subject of another. But a man may become a citizen of the world; an alien to all the governments on earth.¹ It is in evidence that by the laws of Denmark a man can not become a subject and carry on trade without being naturalized; that an oath of allegiance and an actual domicil are necessary to naturalization; but that a domicil is not necessary to become a burgher, for the purpose of navigating a Danish vessel.

In the two cases cited from 1 Rob. 133 (*The Argo*), and 8 T. R. 434 (*Pollard v. Bell*), the question was only as to the national character of the master of the vessel, not of the owner; and therefore, they do not apply to the present case.

The burgher's brief of Captain Wright is dated 19th May, 1794, and certifies that he had taken the oath of fidelity to his Danish majesty, and was entitled to all the privileges of a subject.

3. But if the facts stated in the record are not sufficient to prove Shattuck to be a Danish subject, yet they do not prove him to be a citizen of the United States, and if he is not a citizen of the United States, it is immaterial of what country he is a subject. By the law of nature and nations, a man may, by a *bona fide* domicil, and long continued residence in a country, acquire the character of a neutral, or even of an enemy. In the case of *Scot v. Schawrtz*, Comyns, 677, it was decided that residence in and sailing from Russia gave the mariners of a Russian ship the character of Russian mariners, within the meaning of the British navigation act: and in the case of *The Harmony*, 2 Rob. 264, Sir W. Scott condemned the goods of an American citizen, because, by a residence in France, for four years, he had

¹Ch. J.—There can be no doubt of that.

Dallas, said he had been misunderstood. He only said that the act of becoming a citizen of another state was the most public act of expatriation and the best evidence of the fact.

acquired a domicil in that country which had given his property the character of the goods of an enemy. In the case of *Wilson v. Marryat*, 8 T. R. 31, it was adjudged that a natural-born British subject might acquire the character of a citizen of the United States for commercial purposes.

II. *The Charming Betsy* was not a French armed vessel, capable of annoying our commerce, and therefore not liable to capture or condemnation, by virtue of the limited war which existed between the United States and France. In supporting this proposition, it is not intended to interfere with the decision of this court in the case of *Talbot v. Seeman*. There is a great difference between the force of the *Amelia* in that case, and that of *The Charming Betsy*. The *Amelia* had eight cannon, was manned by twelve Frenchmen, and had been in possession of the French ten days, and must be admitted to have been such an armed French vessel as came within the meaning of the acts of Congress.

But in the present case, the vessel was built at Baltimore, and owned by citizens of the United States. When she sailed from Baltimore, she had four cannon, a number of muskets, etc., which Shattuck was obliged to purchase with the vessel, and which he afterwards sold at a considerable loss. The master swears, that at the time of recapture, she had only one musket, a few balls and twelve ounces of powder; and although McFarlan deposes to a greater quantity of arms, yet it appears that he did not go on board of her until eight days after the recapture. If arms were on board, they ought to have been brought in with the vessel: this is particularly required by the act of Congress. No arms are mentioned in the account of sales; it is to be presumed, as none were brought in, that none were on board. The master expressly swears that the French put no force or arms on board, when they took her. She could not, therefore, be such an armed vessel as was intended by the acts of Congress.

III. She was not in imminent danger when recaptured, and therefore the recaptors are not entitled to salvage. It is a general principle that the recapture of a neutral does not entitle to salvage.

It is not intended to question the correctness of the decision of this court in the case of *Talbot v. Seeman*, nor that of Sir W. Scott, in the case of *The War Onskan*. Those cases were exceptions to the general rule, because the conduct of France was in violation of the law of nations, and because neutral vessels had no chance of escaping the rapacity of the French prize courts. This system of depredation upon

neutral commerce continued during the years 1798 and 1799. The *Amelia* was recaptured by Captain Talbot, in September, 1799, while the *arrêt* of 18th January, 1798, so injurious to neutral commerce, and the violences of the prize courts, were in full operation.

The Charming Betsy was recaptured by Captain Murray, on the 3d of July, 1800. During this interval, great events had occurred in France. On the 9th of November, 1799, Bonaparte was placed at the head of the government, and a new order of things commenced. On the 24th of December, 1799, the *arrêt* of the council of five hundred, of the 18th January, 1798, which made the character of neutral vessels dependent upon the quality of the cargo, and declared good prize all those laden in whole or in part with the productions of England or her possessions, was repealed, and by a new decree, the ordinance of 1778 was reestablished. The government adopted a more enlightened and liberal policy towards neutrals. On the 26th of March, 1800, a new tribunal of prizes was erected, at the head of which was placed the celebrated Portalis, author of the Civil Code. On the 29th of May, 1800, their principles were tested in the case of *The Pegou*, an American ship belonging to Philadelphia. This case was a public declaration to all the world, that they began to entertain a proper respect for the law of nations, and from this time the rule of salvage, as established in the case of *The War Onskan*, ceased.

The Pegou had been condemned in an inferior tribunal. On an appeal to the council of prizes, Portalis, with a degree of liberality and correctness which would confer honor upon any court in the world, declared that "excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes, come to the examination of a fact of neutrality." And in discussing the question as to the necessity of a *rôle d'équipage*, he says, "I will begin with the principle, that all questions about neutrality are what are called in law, questions *bona fide*, in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances." "But it would be a gross error, in believing that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize. Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances, the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

"We must speak to the point; and in these matters, as well as in

those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say, with the law, that mere omissions or mere irregularities in the forms, can not prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*" "The main point in every case is that the judge may be satisfied that the property is neutral or not." He then cited a case decided upon the 6th article of the regulation of the 21st of October, 1744, by which article the act of throwing over papers is made a substantive ground of condemnation. But it was decided that the papers ought to be of such a nature as to prove the property to be enemy's.

The two grounds upon which *The Pegou* was condemned in the inferior tribunal were that she was armed for war, without any commission or authority from the United States, and that there was on board no *rôle d'équipage*, attested by the public officers of the port of departure. She mounted ten guns, and was provided with muskets and other warlike stores. Upon the first point, it was decided in the council of prizes that she was not armed for war, but for lawful defense; and on the second, that a *rôle d'équipage* was not absolutely necessary, if the property appeared otherwise clearly to be neutral.¹

¹There is so much reason, justice and good sense appearing through a bad translation of probably, not a very accurate account of this case, that it is with pleasure transcribed as it has been published in this country from the London public prints.

Opinion of PORTALIS.—After having read the opinion of commissioners of the government, left in writing on the table, which is as follows:

It appears that a judgment of the tribunal of commerce at l'Orient, had granted Captain *Green* the replevy of his vessel and part of the goods and specie which composed the cargo; and that on the appeal entered by the comptroller of marine at l'Orient against that judgment, the tribunal of the department of Morbihan declared the vessel and cargo a good prize.

The grounds on which rested the decision of the tribunal of Morbihan were, that the vessel was armed for war without any commission or authorization from the American Government; and that there was on board no *rôle d'équipage* attested by the public officers of the port of his departure.

The captured claim the nullity of the prize, and that the vessel be reinstated in the situation she was in when captured, and that she be delivered up as well as her cargo, and the dollars which were on board, and also the papers, with damages and interest adequate to the losses they had sustained.

To be able to determine on the respective demands, we must first fix upon the validity or invalidity of the prize, excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes come to the examination of a fact of neutrality.

In this case, was the tribunal of Morbihan authorized to determine that the ship *Pegou* was in such circumstances as to be prevented from being acknowledged and respected as neutral?

It is said the vessel was armed for war, and without any authorization from

In another case (*The Statura*), which was decided very shortly after that of *The Pegou*, by the same council of prizes, two questions arose: 1. Whether *The Statura*, being an American vessel captured by a British ship, and recaptured by a French privateer, was liable to confiscation on the ground of her being in the hands of an enemy; and, 2. Whether her cargo was ground of condemnation?

her government; that she mounted 10 guns of different rates, and that muskets and warlike stores have been found in her.

The captured reply, that the vessel being bound to India, was armed for her own defense, and that the warlike ammunition, the muskets and guns, did not exceed what is usual to have on board for long voyages; for my part, I think it is not for having arms on board only, that a vessel can be said to be armed for war. The warlike armament is merely of an offensive nature; it is deemed so when there is no other end than attacking, or at least when every thing shows that attack is the main point of the armament: then a vessel is reputed inimical, or pirate if she has no commission or papers which may remove the suspicion. But defense is of natural right, and every means of defense is lawful in voyages at sea, as in every other dangerous occurrence of life.

A vessel consisting of but a small crew, and whose cargo in goods amounted to a considerable sum, was evidently intended for trade, and not for war. The arms found on board were not to commit plunder and hostility, but to avoid them; not for attack, but for defense. The pretense of armament for war, in my opinion, can not be founded.

I am now to discuss the second argument against the captors on the want of a *rôle d'équipage*, attested by the public officers of the place of her departure.

To support the validity of the prize, they allege the regulation of the 21st October, 1774, of the 26th of July, 1778, and the decree of the directory of the 12th Ventose, 5th year, which require a *rôle d'équipage*.

The captured, on their part, claim the execution of the treaty of commerce, between France and the United States of America, of the 6th February, 1778; they contend that general regulations could not derogate from a special treaty, and that the directory could not infringe the treaty by an arbitrary decree.

It is a fact that the regulations of 1774 and 1778, and the decree of the directory require a *rôle d'équipage* asserted by the public officers of the place of departure. It is also a fact, that the *rôle d'équipage* is not mentioned in the treaty of the 6th February, as one of the papers requisite to establish neutrality, but I believe I am not under the necessity of discussing whether the treaty is superior to the regulations, or whether the regulations are superior to the treaty.

I will begin with the principle that all questions about neutrality, are what are called in law, questions *bona fide*, in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances.

Neutrality is to be proved; for this reason, the regulation of marine of 1681, article 9, on prizes, states, that vessels with their cargoes, which shall not have on board charter parties, bills of lading, nor invoices, shall be considered as good prize.

From the same motives, the regulations of 1774 and 1778, put the commanders of neutral vessels under obligation of proving at sea their property being neutral, by passports, bills of lading, invoices and vessels' papers.

The regulation of 1774, whose enacting parts have been renewed by the directory, literally expresses, among the papers requisite to prove neutral property, that there must be a *rôle d'équipage* in due form.

But it would be a gross error to suppose that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize.

On the first point, it was held that the mere capture does not, before condemnation, vest the property in the captor, so as to make it transferable to the recaptor, and therefore no ground of confiscation. On the 2d, there were two inquiries: 1. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2. Whether the cargo consisted of contraband?

Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

We must speak to the point, and in these matters as well as in those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say, with the law, that mere omissions, or mere irregularities in the forms, can not prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est*.

Therefore, the regulation of the 26th July, 1778, art. 2, after having stated that the masters of neutral vessels shall prove at sea their property being neutral, by passports, bills of lading, invoices and other vessel papers, adds, one of which at least shall establish the property being neutral, or shall contain an exact description of it.

It is not then necessary in every case to prove the property neutral by the simultaneous concurrence of all the papers enumerated in the regulations. But it is sufficient according to the circumstances, that one of these papers establish the property, if it is not opposed or destroyed by more peremptory circumstances.

The main point in every case is, that the judge may be satisfied that the property is neutral or not.

We have a precedent of what I assert in art. 6, of the regulation of the 21st October, 1774; by that article every vessel belonging to what nation soever, neutral, enemy or ally, from which papers shall be proved to have been thrown overboard, shall be adjudged good prize, on the proof only of the papers having been thrown overboard; nothing can be more explicit.

Some difficulties arose on the execution of that severe clause of the law, which has been renewed by the regulation of 1778.

On the 13th November, 1779, the king wrote to the admiral, that he left entirely to him and to the commissioners of the council of prizes to apply the rigidity of the decree, and of the regulation of the 26th July, or to moderate their clauses as peculiar circumstances would require it in their opinion.

A judgment of the council of the 27th December, in the said year, rendered between Pierre Brandebourg, master of the Swedish ship *Fortune*, and M. de la Rogredourden, captain of the king's xebec the *Fox*, liberated the said vessel notwithstanding some papers had been thrown overboard. It was determined that to ground an adjudication of the vessel on the papers being thrown overboard, they ought to be of such nature as to prove the property enemy's, and that the captain ought to have had a concern in throwing his papers overboard; which was not the case with the Swedish captain.

In this case without discussing whether American captains are obliged or not to exhibit a *rôle d'équipage*, attested by the public officers of the place of their departure, I observe that this *rôle* is supplied by the passport, and that the captured allege the impossibility for them to have their *rôle d'équipage* attested by public officers in Philadelphia, since the intercourse was forbidden, under pain of death, with Philadelphia, where a most tremendous epidemic was raging: I must add, that the passport, the invoice, and all the vessel's papers, establish

As to the first, the commissary (Portalis) reviews the laws upon this subject, prior to the *arrêt* of the council of 500, of the 29th Nivose, year 6 (January 18th, 1798), the severity of which he condemns; but as *The Statira* was captured while it was in force, the captor was entitled to have the capture tried by it. He observes that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis*; that they should always be tempered by wisdom and equity. He adverts to the words *in whole or in part*, by which, he says, ought to be understood, a great part, according to the judicial

evidently the property of the vessel and cargo being neutral; none of these papers have ever been disputed. Thus the invalidity of the capture is obvious; whence it follows that every thing which has been taken from them, ought to be restored in kind or by a just indemnification.

As to their claim for damages and interest, I must observe, that such a claim is not in every case the sequel of the invalidity of the capture.

Suspicious proceedings of the captured, may occasion the mistake of the captors. But when the injustice on the part of the captors can not be excused, the captured have a right to damages and interest.

Let us apply these principles to the cause. Could the captors entertain any grounded suspicions against the captain of the ship *Pegou*? was not the neutrality of the ship proved by her being an American built ship, by her flag, by her destination, by the crew being composed of Americans, by her cargo consisting of American goods, without any contraband articles, by the name and the character of Captain Green, very well known by services he rendered to the French nation, by the register, the passport, the invoice, by the papers on board, finally, by the place where she was captured, which was far from any suspicious destination? It was then impossible for the captors to make any mistake; the vessel struck her colors at the first summons, the officers and crew made faithful declarations, they answered plainly in their examination; no pretense whatever was left to the captors; they don't appear to have observed the forms prescribed by the regulation. Some very heavy charges are uttered against them; but I think it is not time yet to take notice of them; they will be discussed when the articles captured are restored.

In these circumstances I am of opinion, that a more absolute and full replevy be granted to Captain Green of the American ship *Pegou*, and her cargo, as well as the papers found on board; as to the claim of damages and interest, made by Captain Green, that the former be granted to him, and they shall be settled by arbitrators in the usual form.

(Signed) PORTALIS.

Paris, 6 Prairial, 8th year.

The council declare that the capture of the ship *Pegou* and her cargo, is null and of no effect; therefore, grant a full and absolute replevy of the vessel, rigging and apparel, together with the papers and cargo, to Captain John Green; as to the damages and interest claimed by Captain Green, the council grant them to him, and they shall be settled by arbitrators in the usual forms.

Done at Paris on the 9th Prairial, 8th year of the Republic.

Present,

Citizen
Presidents

REDON,
NIOU CANTE,
MOREAU.
MONTIGNY,
MONPLACID,

BARENNES,
DUSAUB,
PAREVAL,
GRANDMAISON,
TOURNACHER.

maxim parum pro nihilo habetur. Upon this principle he is of opinion that a ship ought not to be subject to confiscation, even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest.

The question of contraband related to forty barrels of pitch, part of the cargo of *The Statira*. He observed that pitch was not made contraband by the treaty of 1778, but as France was, by that treaty, entitled to all the advantages of the most favored nation, and as by a subsequent treaty between the United States and Great Britain, pitch was among the enumerated articles of contraband, it necessarily became such in regard to France. He, however, decides the quantity to be too small to justify condemnation, even upon the principle of the law of 24th (*quaere?* 29th) Nivose. And the ship was restored.¹

¹The following account of the case of the *Statira* is extracted from London papers of June 1700.

We stated to our readers some time ago the principles upon which the new council of prizes at Paris proceeded with respect to neutral vessels, and we gave the decision at length upon the American ship *Pegou*, which was ordered to be restored with costs. That decision showed, that a greater degree of system had been established, and that the loose and frequently unjust principles upon which the directory acted with respect to captures of neutral ships, were meant to be abandoned. The following is the decision of the council on another case, that of the *Statira*:

The *Statira*, Captain Seaward, an American ship, had been captured by an English vessel, and recaptured by the French privateer the *Hazard*.

The first point which the commissary considers is, the effect which the *Statira* having been in the possession of the English ought to have.

He observes, that if the vessel captured and recovered had been French, and recaptured by a national vessel, there would have been nothing due to the recaptor, because this is only the exercise of that protection which the state owes to all its subjects in all circumstances. If it had been recaptured by a privateer, the French regulation gives the property of the vessel to the recaptor, on account of the risk and danger of privateering. It might be an act of generosity to restore the vessel to the original owner, but it is not of right that it should.

In the next place, he considers the case of a neutral recaptured from the enemy. If really neutral, he says the vessel must be released. The ground of this higher degree of favor for a neutral he states to be, that the French vessel must have been lost in the country. But it is not certain that the neutral captured by an enemy may not be released by the admiralty courts of the enemy. The mere capture does not vest the property immediately in the captor, so as to make it transferable to the recaptor. The commissary considers the property not vested in the captor till sentence of condemnation.

We believe this is much milder, and more favorable for neutrals than our practice. The being a certain time in the enemy's custody, or *intra maenia*, transfers the property to the captor. This was held in the late well-known case of the Spanish prize, captured by the French, and recaptured by the English. It is to be observed, however, that a principle of reciprocity is pursued, and that we give the same indulgence to the neutral which they would have given us in a similar case.

These cases are read to show that France had abstained from those violations of the law of nations which had caused the rule in the case of *The War Onskan*; and to bring the present case within the principles established by the court in the case of *Talbot v. Seeman*.

The general conduct of France having been changed, it is to be presumed she would have been released, with damages and costs; if not upon the principles of justice, good faith, and the law of nations, yet upon those of policy. France was at war with Great Britain; partial hostilities existed with the United States. The non-intercourse law prevented our vessels from trading with France or her dependencies; and the French West Indies could only be supplied from the Danish islands. It is not to be believed, therefore, that they would, by condemning this vessel (coming to them with those very supplies which they wanted), embarrass a trade so necessary to their very existence.

But independently of the general misconduct of France towards neu-

Having proved that the *Statira* was not liable to confiscation, on the ground of her being in the hands of an enemy, the commissary considers whether her cargo was ground of confiscation.

Upon this point he considers two questions, 1st, whether in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d, whether the cargo consisted of contraband?

He then reviews all the laws upon this head. He shows that till the decree of the 29th Nivose, (year 6) January 18, 1798, the regulation states, "His majesty prohibits all privateers to stop and bring into the ports of the kingdom the ships of neutral powers, even though coming from or bound to the ports of the enemy, with the exception of those carrying supplies to places blockaded, invested or besieged. With regard to the ships of neutral states laden with contraband commodities for the enemy, they may be stopped and the said commodities shall be seized and confiscated, but the vessels and the residue of their cargo shall be restored, unless the said contraband commodities constituted three-fourths of the value of the cargo, in which case the ship and cargo shall be wholly confiscated. His majesty however reserves the right of revoking the privileges above granted, if the enemy do not grant a reciprocal indulgence in the course of six months from the date hereof.

The law of the 29th Nivose (year 6), overturned all this system, and enacted, "That the state of ships in regard to their being neutral or hostile, should be determined by their cargo; that accordingly every vessel found at sea, laden in whole or in part with commodities coming from England or its possessions, should be declared good prize, whoever might be owners of their articles and commodities."

The severity of this regulation the commissary condemns, but as the *Statira* was captured while it was in force, the captor was entitled to have the capture tried by it.

He examines next how the regulation applies, premising his opinion that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis*; that they should always be tempered by wisdom and equity. He adverts to the words in whole or in part. By the whole, he says, ought to be understood a great part, according to the judicial maxim *parum pro nihilo habetur*. Upon this principle then, he is of opinion that a ship ought not to be subject to confiscation even under the law of the 29th Nivose, unless such

trals, the captors rely upon three points arising under French ordinances.

1. That the *rôle d'équipage* wants the place of nativity of the crew. But, according to the opinion of Portalis, this is not a fatal defect, nor is it, of itself, a sufficient ground for condemnation.

2. That more than one-third of the crew were enemies of France. The word *matelot*, in the ordinance of 1778, means a sailor, in contradistinction to the captain or master. Exclude the master, and there were only ten persons on board, and only three of those are pretended to be enemies; so that one-third were not enemies, within the meaning of the ordinance.

But these three pretended enemies were Americans. The hostilities which existed between France and the United States amounted at most to a partial, limited war, according to the decision of this court in the case of *Bas v. Tingy*. It was only a war against French armed force found on the high seas. It did not authorize private hostilities between the citizens of the two countries. Individuals are only enemies to each

a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest. What that part should be is not capable of definition, but should be left to the enlightened equity and sound discretion of the judge.

The *Statira* had on board sixty barrels of turpentine and forty barrels of pitch. The captor contended that these were contraband; the captured said, that by the treaty of 1778 with the Americans, they were not enumerated as contraband.

But the commissary shows, that the Americans by the treaty were bound to admit the French to all the advantages of the most favorite nations; that having, in a subsequent treaty with England, made pitch contraband, with respect to the latter, necessarily it became contraband with regard to France.

The learned commissary, however, thinks that even upon the principle of the law of the 24th Nivose, the quantity of pitch was too small to justify confiscation.

In the next place the captor alleged, that 2911 pieces of Campeachy wood, part cargo of the *Statira*, was the produce of English possessions.

This point, however, had not been regularly ascertained, as the report on the subject was made without the captured being called as a party.

The commissary states, however, strong circumstances of suspicion on this head. The captured had not appealed against the confiscation of the cargo. The point came under the consideration of the court on the appeal of the captor, who wanted to get both ship and cargo.

The commissary therefore saw no reason for condemning the ship, which was clearly neutral; but on account of the suspicions against the character of the cargo, he thought no indemnification whatever was due to the captured.

Judgment was pronounced accordingly.

The piratical decree of the 29th Nivose (year 6), mentioned above with so much severity by Portalis, has been repealed, and things have been placed upon the footing of the regulation of 1778; that is, the French are to treat neutrals in regard to contraband in the same way in which they are treated by us; they will not allow the Americans to carry into England a commodity which the English would seize as contraband going into the ports of France.

other, in a general war. The war extended only to those objects pointed out in the acts of Congress; as to everything else, the state of the two nations was to be considered as a state of peace. It was a war only *quoad hoc*. The individuals of the two nations were always neutral to each other. A citizen of the United States could only be considered as an enemy of France, while in arms against her; the neutrality was the counterpart, or (to use a mathematical expression), the complement of the war. A citizen of the United States, peaceably navigating a neutral vessel, could not be burdened with the character of enemy.

3. The master was a Scot by birth. The ordinance cited from 1 *Code des Prises*, 303, § 6, in support of this objection, is in the alternative. The master of the vessel must be naturalized in a neutral country, or must have transferred his domicil to the neutral country, three months before the first of September in that year. Naturalization is not necessary, if there be such a transfer of the domicil; and the domicil is not necessary, if the party be naturalized. But the authority of Portalis shows that these decrees are not to be considered as laws, but *sub modo*. They are only regulations made at particular times, for particular purposes.

If the same evidence had been produced at Guadeloupe, which has been brought here (and the same would have been more easily obtained there), there can be no doubt the vessel would have been restored. It is in evidence that other vessels of Mr. Shattuck had been released. No salvage can be allowed, unless the danger was imminent, not problematical.

IV. Under all the circumstances of the case, Captain Murray acted illegally, and is liable for damages; which have been properly assessed. His subsequent conduct rendered the transaction tortious, *ab initio*. If he was justified in rescuing the vessel from the hands of the French, his subsequent detention of the vessel, and the sale of the cargo at Martinique by his own agent, without condemnation, were unauthorized acts, in violation of the rights of neutrality. The libel says nothing of the cargo; it is first mentioned in the replication. The libel only prays condemnation of the vessel, on the ground of violation of the non-intercourse law.

By law, he was bound to bring the vessel and cargo into a port of the United States for adjudication, and had no authority to sell the cargo, before condemnation. As to the pretense of her being an armed

French vessel, he ought to have sent the arms into port with the vessel, as the only evidence of their existence.

The commander of the French privateer, in his commission to the prize-master, calls her the Danish schooner *Charming Betsy*, William Wright, master. There was no evidence to impeach the credence due to the papers found on board of her, which at that time had every appearance of fairness, and which have since been incontestably proved to be genuine.

The facts stated in the *procès verbal* are, that she had no log-book; that the mate declared himself to be an American; that the flag and pendant were American; that the Danish flag had been made, during the chase, which was confirmed by the two boys, and that she had no pass from the French consul. Whatever weight might be given to these facts, if true, yet the outrageous and disorderly conduct of the crew of the privateer entirely destroys the credit of the *procès verbal*, and at best it would be only the declaration of interested plunderers.

But it is said that, by the law of nations, probable cause is a sufficient excuse; and that this law operates as the law of nations. In revenue laws, probable cause is no justification, unless it is made so by the laws themselves. This is not a war measure. If the United States were at war, it was unnecessary, because the act of trading with an enemy is itself a ground of condemnation. This law was passed because the United States were not at war, and wished to avoid it, by showing their power over the French colonies in the West Indies. It is a municipal regulation, as well suited to a state of peace as of war. It affects our own citizens only. It is no part of the law of nations. What would other nations call it, were they bound to notice it? It can give no right to search and seize neutrals. It could not affect their rights.

He who takes must take at his peril. The law only gives authority to seize vessels of the United States. If he takes the vessel of another nation, he must answer it.

As to the damages. Nothing can justify Captain Murray; but it was a mistake of the head, not of the heart. His intentions were honest and correct, but he suffered his suspicions to carry him too far. If it was an error in judgment, shall he have salvage? If an injury has been done to the innocent and unfortunate owner, shall he have no redress? The consequences to him were the same, whatever might have been the motive. The damages have been properly assessed in the district court. If damages are to be given, they ought not to be less

than the original cost of vessel and cargo, with the outfit, insurance, interest and expenses; and upon calculation, it will be found that the damages assessed do not exceed the amount of these.¹

Dallas.—It is said that Mr. Shattuck never was a citizen of the United States. What is averred and admitted need not be proved. Mr. Soderstrom, in his rejoinder, expressly admits that he was once a citizen of the United States by alleging that he had transferred his allegiance from the Government of the United States to his Danish majesty. Mr. Shattuck's burgher's brief is, at length, for the first time, produced and admitted to be made a part of the record. It bears date on the 10th of April, 1797. It may here be remarked that some of the witnesses have testified that he became a burgher in 1795. This shows how little reliance ought to be placed upon their testimony. If, then, Mr. Shattuck did expatriate himself, it was not until April, 1797. It has been conceded that a man can not expatriate himself unless it be done in a fit time, with fairness of intention, and publicity of act.

As to the fitness of the time. What was the situation of this country and France in the year 1797? In 1795, the British treaty had excited the jealousy of France. In 1796, she passed several edicts highly injurious to our commerce. Mr. Pinckney had been sent as an envoy extraordinary, and was refused. France had gone on in a long course of injury and insult, which at length roused the spirit of the nation. On the 14th of June, 1797, the act of Congress was passed, prohibiting the exportation of arms; on the 23d, the act for the defense of the ports and harbors of the United States; on the 24th, the act for raising 80,000 militia; on the 1st July, the act providing a naval armament; on the 13th of June, 1798, the first non-intercourse bill was passed, and on the 7th of July, the treaties with France were annulled. These facts show that the time when Mr. Shattuck chose to expatriate himself, was a time of approaching hostilities, and when everything indicated war.

As to the fairness of his intention. The same facts show what that intention was. It was to carry on that trade which everything tended to show would soon become criminal by the laws of war, and from the exercise of which the other citizens of the United States were about to

¹MARSHALL, Ch. J. What would have been the law as to probable cause, if there had been a public general war between France and the United States, and the vessel had been taken on suspicion of being a vessel of the United States, trading with the enemy, contrary to the laws of war? Would probable cause excuse, in such a case, if it should turn out that she was a neutral?

be interdicted. The act of Congress points to this very case. It was to prevent transactions of this nature, that the word "elsewhere" was inserted.

But why was not this burgher's brief, or a copy of it, put on board the vessel? The answer is obvious, because it would have discovered the time of expatriation, which would have increased the suspicions excited by the origin of the vessel, by the recent transfer, by the nature of the cargo, and by the character of the crew. Domicil in a neutral country gives a man only the rights of trade; it will not justify him in a violation of the laws of his country.

If, then, Mr. Shattuck could not expatriate himself, or if he has not expatriated himself, he is bound to obey the laws of the United States. A nation has a right to bind, by her laws, her own citizens residing in a foreign country; as the United States have done in the act of Congress respecting the slave-trade and in the non-intercourse law.

The question, whether the vessel was capable of annoying our commerce, depends upon matter of fact, of which the court will judge. The number of men was sufficient; the testimony respecting the cutlasses is supported by the nature of the transaction, and by the usage in such cases. Some arms were necessary to prevent Captain Wright and his boys from rising and rescuing the vessel. Circumstances are as strong as oaths, and are generally more satisfactory. The vessel, having port-holes, was constructed for war, and in an hour after her arrival at Guadeloupe, might have been completely equipped. Upon the principles of the case of *Talbot v. Seeman*, Captain Murray was bound to guard against this, and he would have been culpable, if he had suffered her to escape.

But it is said that she was not in danger of condemnation by the French, because France had ceased from her violation of the laws of nations, because she had repealed the obnoxious *arrêt* of 18th January, 1798, and because one-third of the crew were not her enemies. Admitting all this, yet if one ground of condemnation remained, she would have been condemned. The vessel was transferred from an enemy to a neutral, during the heat of hostilities. This alone was a sufficient ground of condemnation, under the ordinance already cited from 1 *Code des Prises*, 304, art 7. In the case of *Talbot v. Seeman*, the ground of salvage was that the vessel was liable to condemnation under a French *arrêt*. And that the courts of France were bound to carry the *arrêt* into effect.

The conduct of Captain Murray was not illegal. He was bound, by law, as well as by his instructions, to take the vessel out of the hands of the French. It was with the consent, if not at the request, of Captain Wright; and it was in itself an act of humanity. His conduct was fair, upright and honorable in the whole transaction. He offered to take security for the vessel and cargo.* The cargo was perishable: if it had been brought to the United States, it would not have been in a merchantable condition; or if it had been, it would not have sold so high here (being chiefly articles of American produce) as at Martinique. The sale was fair, and the proceeds brought to the United States to wait the event of the trial.

Probable cause is a thing of maritime jurisdiction; and authorities in point may be found, even at common law. If it is a municipal regulation, it is one which affects the whole world. It is engrafted upon the law of nations. It is municipal only as it emanates from the municipal authority of the nation. But the whole world is bound to notice a law which affects the interests of all nations in the world.

As to the damages. The principles upon which they are assessed do not appear from the report of the assessors, but the probability is that they were founded upon the estimates of the probable profits of the voyage, as stated in the testimony of some of the witnesses. In a case of this kind, where the purity of intention is admitted, it can never be proper to give speculative or vindictive damages.¹

Martin, in reply.—1. As to the national character of Shattuck. He was born before the revolution; probably, in 1773 or 1774; at least twenty-one years before April 10th, 1797, which will bring it before the Declaration of Independence. In *Duane's Case*, it was decided that even if it had been proved, that he was born in New York, yet his birth being before the revolution, and having been carried to Ireland during his minority, he was an alien.

The rejoinder of Mr. Soderstrom does not admit the fact that Shattuck was a citizen of the United States; but if it did, it is coupled with an express allegation that he had duly expatriated himself; and if part is taken, the whole must be taken. The words of the rejoinder are, "and this party expressly alleges and avers that the said Jared Shattuck, at the several times and periods above mentioned, and long before, and in the intermediate times which elapsed between the said several times

¹In answer to an inquiry by the Chief Justice for authorities to support the position that probable cause is always a justification in maritime cases, Mr. DALLAS referred generally to Browne's Civil and Admiralty Law, and to the decisions of Sir Wm. Scott.

or periods, had been, then was, ever since hath been, and now is, a subject of his majesty the king of Denmark, owing allegiance to his said majesty, and to no other prince, potentate, state or sovereignty whatever; and that he, the said Jared Shattuck, had, long before his said purchase of the said schooner, duly expatriated himself from the dominions of the United States, to those of his said majesty; and transferred his allegiance and subjection from the said United States and their government to his said majesty and his government." The whole purport of which is, that if he was ever a citizen of the United States, he had expatriated himself.

Even if it was an admission of the fact, yet it could not prejudice Mr. Shattuck, as the rejoinder is by Mr. Soderstrom, in character of consul of Denmark, and as the representative of the nation. If he was born before the revolution, he never owed natural allegiance to the United States; and if he remained here, after the revolution, during part of his minority, he owed only a temporary and local allegiance; during the existence of which, if he had taken up arms against the United States, he would have been guilty of treason. But that allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased. Foster's Cr. Law, 183, 185.

That he acted with a fair and honest intention is proved by his *bona fide* residence and domicil for ten or eleven years. 2 Browne's Civil and Admiralty Law, 328. The navigation act of Great Britain is a municipal law, and yet a *bona fide* domicil and residence of foreigners, were held sufficient to bring the persons within its provisions. *Scot qui tam*, v. *Schawrtz*, Comyns, 677.¹

¹The case of *Scot v. Schawrtz*, was an information against the Russian ship *The Constant*, because the master and three-fourths of the mariners were not of that country or place, according to the Statute of 12. Car. 2, C. 18, § 8. The ship was built in Russia, and the cargo was the product of that country. The master was born out of the Russian dominions, but in 1733 was admitted, and ever since continued a burgher of Riga; and had been a resident there, when not engaged in foreign voyages, and traded from thence, nine years before the seizure. There were only eleven mariners on board, of whom four were born in Russia; Morgan a fifth was born in Ireland and there bound apprentice to the master, and as such went with him to Riga, and for three or four years before the seizure, served on board the same ship and sailed therein from Riga, on this and former voyages. The other six were born out of the dominions of Russia, but Stephen Hanson, one of them, had resided at Riga eight years next before the seizure—Hans Yasper five years—Rein Steingrave four years, and Derrick Andrews, the cook, seven years, and these four, during those years had sailed from Riga in that and other vessels.

It was adjudged that these people were of that country or place, within the meaning of the Statute, and the vessel properly manned and navigated.

But a stronger case than that is found in 1 Bos. & Pul. 430 (*Marratt v. Wilson*), in the exchequer chamber, on a writ of error from the king's bench. In that case, a natural-born British subject, naturalized in the United States, since the peace, was adjudged to be a citizen of the United States, within the treaty and navigation acts of Great Britain, so as to carry on a direct trade from England to the British East Indies. The opinion of EYRE, Ch. J., beginning in p. 439, is very strong in our favor.

There is no probability that the vessel would have been condemned at Guadeloupe. Mr. Shattuck, and his course of trade, were well known there, and they had already released some of his vessels. Another reason is that Bonaparte was at that time negotiating with the northern powers of Europe, to form a coalition to support the principle that free ships should make free goods; and he would have succeeded but for the able negotiations of Lord Nelson at Copenhagen.

In *Park on Insurance*, 363, it is said, "If the ground of decision appear to be, not on the want of neutrality, but upon a foreign ordinance manifestly unjust, and contrary to the law of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it can not apply to the warranty so as to discharge the insurer." And in support of this position he cites the case of *Mayne v. Walter*.

There is no ordinance of France which, upon the principles established in the case of *The Pegou*, would have been a sufficient ground of condemnation. The circumstances required by those ordinances are only evidence of neutrality, which is always a question of *bona fides*. A condemnation upon either of these ordinances alone would have been contrary to the law of nations; but if they are considered as only requiring certain circumstances, tending to establish the fact of neutrality, they are perfectly consistent with that law. This is the light in which they have been considered by Portalis. The French have never considered our vessels as the vessels of an enemy. Our vessels have not been condemned by them as enemy property; but their sentences have always been grounded upon a pretended violation of some particular ordinance of France. Hence, it appears that they would not have considered an American vessel, sold to a Dane, as an enemy's vessel transferred to a neutral during a state of war.

But the claim of salvage is an afterthought. It was not necessary to bring her to the United States to obtain salvage. Salvage is a ques-

tion of the law of nations, and may be decided by the courts of any civilized nation. Instead of rendering a service, he has done a tenfold injury. Captain Murray's intentions were undoubtedly correct and honorable, and we do not wish vindictive damages; but Mr. Shattuck will be a loser, even if he gains his cause, and recovers the damages already assessed. Probable cause can not justify the taking and bringing in a neutral; but it may prevent vindictive damages.

February 22d, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—*The Charming Betsy* was an American-built vessel, belonging to citizens of the United States, and sailed from Baltimore, under the name of *The Jane*, on the 10th of April, 1800, with a cargo of flour for St. Bartholomew; she was sent out for the purpose of being sold. The cargo was disposed of at St. Bartholomew; but finding it impossible to sell the vessel at that place, the master proceeded with her to the island of St. Thomas, where she was disposed of to Jared Shattuck, who changed her name to that of *The Charming Betsy*, and having put on board her a cargo consisting of American produce, cleared her out, as a Danish vessel, for the island of Guadeloupe.

On her voyage she was captured by a French privateer, and eight hands were put on board her for the purpose of taking her into Guadeloupe as a prize. She was afterwards recaptured by Captain Murray, commander of the *Constellation* frigate, and carried into Martinique. It appears that the master of *The Charming Betsy* was willing to be taken into that island; but when there, he claimed to have his vessel and cargo restored, as being the property of Jared Shattuck, a Danish burgher.

Jared Shattuck was born in the United States, but had removed to the island of St. Thomas, while an infant, and was proved to have resided there ever since the year 1789 or 1790. He had been accustomed to carry on trade as a Danish subject; had married a wife and acquired real property in the island, and also taken the oath of allegiance to the crown of Denmark in 1797.

Considering him as an American citizen, who was violating the law prohibiting all intercourse between the United States and France, or its dependencies, or the sale of the vessel as a mere cover to evade that law, Captain Murray sold the cargo of *The Charming Betsy*, which consisted of American produce, in Martinique, and brought the vessel into the port of Philadelphia, where she was libelled under what is

termed the non-intercourse law. The vessel and cargo were claimed by the consul of Denmark as being the *bona fide* property of a Danish subject.

This cause came on to be heard before the judge for the district of Pennsylvania, who declared the seizure to be illegal, and that the vessel ought to be restored, and the proceeds of the cargo paid to the claimant, or his lawful agent, together with costs and such damages as should be assessed by the clerk of the court, who was directed to inquire into and report the amount thereof; for which purpose he was also directed to associate with himself two intelligent merchants of the district, and duly inquire what damage Jared Shattuck had sustained by reason of the premises. If they should be of opinion that the officers and crew of the *Constellation* had conferred any benefit on the owners of *The Charming Betsy*, by rescuing her out of the hands of the French captors, they were, in the adjustment, to allow reasonable compensation for the service.

In pursuance of this order, the clerk associated with himself two merchants, and reported that having examined the proofs and vouchers exhibited in the cause, they were of opinion that the owner of the vessel and cargo had sustained damage to the amount of \$20,594.16, from which is to be deducted the sum of \$4,363.86, the amount of moneys paid into court arising from the sales of the cargo, and the further sum of \$1,300, being the residue of the proceeds of the said sales remaining, to be brought into court, \$5,663.86. This estimate is exclusive of the value of the vessel, which was fixed at \$3,000. To this report an account is annexed, in which the damages, without particularizing the items on which the estimate was formed, were stated at \$14,930.30.

No exceptions having been taken to this report, it was confirmed, and, by the final sentence of the court, Captain Murray was ordered to pay the amount thereof. From this decree an appeal was prayed to the circuit court, where the decree was affirmed so far as it directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, and reversed for the residue. From this decree, each party has appealed to this court.

It is contended on the part of the captors, in substance, 1st. That the vessel *Charming Betsy* and cargo are confiscable under the laws of the United States. If not so, 2d. That the captors are entitled to salvage. If this is against them, 3d. That they ought to be excused from damages, because there was probable cause for seizing the vessel and bringing her into port.

1. Is *The Charming Betsy* subject to seizure and condemnation for having violated a law of the United States? The libel claims this forfeiture, under the act passed in February, 1800, further to suspend the commercial intercourse between the United States and France, and the dependencies thereof. That act declares, "that all commercial intercourse," etc. It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals, in the islands is, during war, a profitable business, which Congress can not be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication. It has also been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct, and they ought to be kept in view, in construing the act now under consideration.

The first sentence of the act which describes the persons whose commercial intercourse with France, or her dependencies, is to be prohibited, names any person or persons resident within the United States, or under their protection. Commerce carried on by persons within this description is declared to be illicit. From persons the act proceeds to things, and declares explicitly the cases in which the vessels employed in this illicit commerce shall be forfeited. Any vessel owned, hired or employed, wholly or in part, by any person residing within the United States, or by any citizen thereof, residing elsewhere, which shall perform certain acts recited in the law, becomes liable to forfeiture. It seems to the court to be a correct construction of these words to say that the vessel must be of this description, not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed.

The cases of forfeiture are, first, a vessel of the description mentioned which shall be voluntarily carried, or shall be destined, or permitted to proceed to any port within the French Republic. She must, when carried, or destined, or permitted to proceed to such port, be a vessel within the description of the act. The second class of cases are those where vessels shall be sold, bartered, intrusted, or transferred, for the purpose that they may proceed to such port or place. This part of the section makes the crime of the sale dependent on the purpose

for which it was made. If it was intended that any American vessel, sold to a neutral, should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted. The third class of cases are those vessels which shall be employed in any traffic by or for any person resident within the territories of the French Republic, or any of its dependencies. In these cases, too, the vessels must be within the description of the act, at the time the fact producing the forfeiture was committed.

The Jane having been completely transferred, in the island of St. Thomas, by a *bona fide* sale, to Jared Shattuck, and the forfeiture alleged to have accrued on a fact subsequent to that transfer, the liability of the vessel to forfeiture must depend on the inquiry, whether the purchaser was within the description of the act.

Jared Shattuck having been born within the United States, and not being proved to have expatriated himself, according to any form prescribed by law, is said to remain a citizen, entitled to the benefit, and subject to the disabilities imposed upon American citizens; and therefore to come expressly within the description of the act which comprehends American citizens residing elsewhere.

Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting subject, seem completely to establish the principle, that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as that now under consideration. Indeed, the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without

the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favor, would be considered as a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance, and, consequently, takes him out of the description of the act.

It is, therefore, the opinion of the court that *The Charming Betsy*, with her cargo, being at the time of her recapture the *bona fide* property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island.

2. The vessel not being liable to confiscation, the court is brought to the second question, which is—Are the recaptors entitled to salvage?

In the case of *The Amelia* (1 Cr. 1), it was decided, on mature consideration, that a neutral armed vessel, in possession of the French, might, in the then existing state of hostilities between the two nations, be lawfully captured; and if there were well-founded reasons for the opinion, that she was in imminent hazard of being condemned as a prize, the recaptors would be entitled to salvage. The court is well satisfied with the decision given in that case, and considers it as a precedent not to be departed from in other cases attended with circumstances substantially similar to those of *The Amelia*. One of these circumstances is, that the vessel should be in a condition to annoy American commerce.

The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps it would be difficult precisely to mark the limits, the passing of which would bring a captured vessel within the description of the acts of Congress on this subject. But although there may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder and a few balls. The testimony respecting the cutlasses is not considered, as showing that they were in the vessel at the time of her recapture. The capacity of this vessel for offense appears not sufficient to warrant the capture of her as an armed vessel. Neither is it proved to the satisfaction of the

court, that *The Charming Betsy* was in such imminent hazard of being condemned, as to entitle the recaptors to salvage.

It remains to inquire whether there was in this case such probable cause for sending in *The Charming Betsy* for adjudication, as will justify Captain Murray for having broken up her voyage, and excuse him from the damages sustained thereby. To effect this, there must have been substantial reason for believing her to have been at the time, wholly or in part, an American vessel, within the description of the act; or hired or employed by Americans; or sold, bartered or trusted for the purpose of carrying on trade to some port or place belonging to the French Republic.

The circumstances relied upon are, principally, 1st. The *procès verbal* of the French captors. 2d. That she was an American-built vessel. 3d. That the sale was recent. 4th. That the master was a Scotchman, and the muster-roll showed that the crew were not Danes. 5th. The general practice in the Danish islands of covering neutral property.

The *procès verbal* contains an assertion that the mate declared that he was an American, and that their flag had been American, and had been changed, during the cruise, to Danish, which declaration was confirmed by several of the crew. If the mate had really been an American, the vessel would not, on that account, have been liable to forfeiture. nor would that fact have furnished any conclusive testimony of the character of the vessel. The *procès verbal*, however, ought for several reasons to have been suspected. The general conduct of the French West India cruisers, and the very circumstance of declaring that the Danish colors were made during the chase, were sufficient to destroy the credibility of the *procès verbal*. Captain Murray ought not to have believed that an American vessel, trading to a French port, in the assumed character of a Danish bottom, would have been without Danish colors.

That she was an American vessel, and that the sale was recent, can not be admitted to furnish just cause of suspicion, unless the sale of American-built vessels had been an illegal or an unusual act. That the master was a Scotchman, and that the names of the crew were not generally Danish, are circumstances of small import, when it is recollected that a very great proportion of the inhabitants of St. Thomas are British and Americans. The practice of covering American property in the islands might and would justify Captain Murray in giving to other causes of suspicion more weight than they would otherwise

be entitled to, but can not be itself a motive for seizure. If it was, no neutral vessel could escape, for this ground of suspicion would be applicable to them all.

These causes of suspicion, taken together, ought not to have been deemed sufficient to counterbalance the evidences of fairness with which they were opposed. The ship's papers appear to have been perfectly correct, and the information of the master, uncontradicted by those belonging to the vessel who were taken with him, corroborated their verity. No circumstance existed which ought to have discredited them. That a certified copy of Shattuck's oath, as a Danish subject, was not on board, is immaterial, because, being apparently on all the papers a burgher, and it being unknown that he was born in the United States, the question whether he had ceased to be a citizen of the United States could not present itself.

Nor was it material, that the power given by the owners of the vessel to their master to sell her in the West Indies, was not exhibited. It certainly was not necessary to exhibit the instructions under which the vessel was acquired, when the fact of acquisition was fully proved by the documents on board, and by other testimony.

Although there does not appear to have been such cause to suspect *The Charming Betsy* and her cargo to have been American, as would justify Captain Murray in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character to produce a conviction that he acted upon correct motives from a sense of duty; for which reason this hard case ought not to be rendered still more so by a decision in any respect oppressive.

His orders were such as might well have induced him to consider this as an armed vessel within the law, sailing under authority from the French Republic; and such, too, as might well have induced him to trust to very light suspicions respecting the real character of a vessel appearing to belong to one of the neutral islands. A public officer, intrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages. It is not only the duty of the court to relieve him from such, when they plainly appear to have been imposed on him, but no sentence against him ought to be affirmed, where, from the nature of the proceedings, the whole case appears upon the record, unless those pro-

ceedings are such as to show on what the decree has been founded, and to support that decree.

In the case at bar, damages are assessed as they would be by the verdict of the jury, without any specification of items, which can show how the account was made up, or on what principles the sum given as damages was assessed. This mode of proceeding would not be approved of if it was even probable, from the testimony contained in the record, that the sum reported by the commissioners of the district court was really the sum due. The district court ought not to have been satisfied with a report, giving a gross sum in damages, unaccompanied by any explanation of the principles on which that sum was given. It is true, Captain Murray ought to have excepted to this report. His not having done so, however, does not cure an error apparent upon it, and the omission to show how the damages which were given had accrued, so as to enable the judge to decide on the propriety of the assessment of his commissioners, is such an error.

Although the court would in any case disapprove of this mode of proceeding, yet, in order to save the parties the cost of further prosecuting this business in the circuit court, the error which has been stated might have been passed over, had it not appeared probable that the sum for which the decree of the district court was rendered is really greater than it ought to have been, according to the principles by which the claim should be adjusted.

This court, therefore, is not satisfied with either the decree of the district or circuit court, and has directed me to report the following decree:

DECREE OF THE COURT.—This cause came on to be heard, on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, it is adjudged, ordered and decreed as follows, to wit: That the decree of the circuit court, so far as it affirms the decree of the district court, which directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to amount exhibited by Captain Murray's agent, being one of the exhibits in the cause, and so far as it directs the parties to bear their own costs, be affirmed; and that the residue of the said decree, whereby the claim of the owner to damages for the seizure and detention of his vessel was rejected, be reversed.

And the court, proceeding to give such further decree as the circuit court ought to have given, doth further adjudge, order and decree, that so much of the decree of the district court as adjudges the libellant to pay costs and damages, be affirmed; but that the residue thereof, by which the said damages are estimated at \$20,594.16, and by which the libellant was directed to pay that sum, be reversed and annulled. And this court does further order and decree, that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, in consequence of the refusal of the libellant to restore the vessel and cargo at Martinique, and in consequence of his sending her into a port of the United States for adjudication; and that the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States, as the standard by which the damages ought to be measured. Each party to pay his own costs in this court, and in the circuit court. All which is ordered and decreed accordingly.¹

LITTLE, ET AL. v. BARREME, ET AL. (*FLYING FISH*)²

Responsibility of naval officer for illegal seizure.—Probable cause.

The commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril: if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.

The act of the 9th of February, 1799, did not authorize the seizure upon the high seas of any vessels sailing from a French port; and the orders of the President of the United States could not justify such a seizure.

Quære? Whether probable cause will excuse from damages?

Appeal from the Circuit Court for the District of Massachusetts.

On the 2d of December, 1799, the Danish brigantine *Flying Fish* was captured, near the island of Hispaniola, by the United States frigates *Boston* and *General Green*, upon suspicion of violating the Act of Congress, usually termed the non-intercourse law, passed on the 9th of February, 1799 (1 U. S. Stat. 613), by the 1st section of

¹Captain Murray was reimbursed his damages, interest and charges, out of the Treasury of the United States, by an act of Congress, January 31, 1805.

²2 Cranch, 170.

which it is enacted, "That from and after the first day of March next, no ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, and may be prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

And by the 5th section, it is enacted, "That it shall be lawful for the President of the United States to give instructions to the commanders of the public armed ships of the United States, to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French Republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel, to seize every such ship or vessel engaged in such illicit commerce, and send the same to the nearest port in the United States; and every such ship or vessel, thus bound or sailing to any such port or place, shall, upon due proof thereof, be liable to the like penalties and forfeitures as are provided in and by the first section of this act."

The instructions given in consequence of this section, bear date the 12th of March, 1799, and are as follows:

SIR:—Herewith you will receive an Act of Congress further to suspend the commercial intercourse between the United States

and France, and the dependencies thereof, the whole of which requires your attention. But it is the command of the President, that you consider particularly the fifth section as part of your instructions, and govern yourself accordingly. A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really, American, and protected by American papers only; but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

Whenever, on just suspicion, you send a vessel into port to be dealt with according to the afore-mentioned law, besides sending with her all her papers, send all the evidence you can obtain to support your suspicions, and effect her condemnation. At the same time that you are thus attentive to fulfill the objects of the law, you are to be extremely careful not to harass or injure the trade of foreign nations with whom we are at peace, nor the fair trade of our own citizens.

In the district court of Massachusetts, the vessel and cargo were ordered to be restored, without damages or costs. Upon the question of damages, the Honorable Judge Lowell delivered the following opinion:

This libel is founded on the statutes of the United States, made to suspend the commercial intercourse between the United States and France, and the dependencies thereof. The libellants not having produced sufficient proof to bring this vessel and cargo so far within the provisions of these statutes as to incur a forfeiture thereof, the same has been decreed to be delivered to the claimants. The question remaining to be decided is, whether the claimants are entitled to damages, which they suggest to have arisen to them, or those for whom they claim, by the capture and detention.

The facts which appear and are material to this question are, that the vessel was owned, and her cargo, by Samuel Goodman, a Prussian by birth, but now an inhabitant of the Danish island of St. Thomas; that the master was born in, and is now of, the same island, but for several years had been employed in vessels of citizens of the United States, and sailed out of our ports; that he speaks our language perfectly, in the accent of an American, and has the appearance of being one. The mate is a citizen of the

United States, born here, and having always continued such. The rest of the seamen are Englishmen, Portuguese and negroes: the supercargo, a Frenchman. The vessel had carried a cargo of provisions and dry goods from St. Thomas to Jeremie, and was returning thither, loaded with coffee, when captured. That during the chase by the American frigates, the master threw overboard the log-book, and certain other papers. That there was on board a protest signed by the master, supercargo and several seamen, in which they declared that the vessel had been bound from St. Thomas to Port au Prince, and was compelled by Rigaud's vessels to go into Jeremie, which was false and totally unfounded; and that, after the capture, the master inquired of his seamen whether they would stand by him respecting this pretense. That the statutes of the United States prohibiting intercourse with France and its dependencies had been long before known at St. Thomas, and that it had been since a common practice there, to cover American property for the purpose of eluding the law.

If a war of a common nature had existed between the United States and France, no question would be made but the false papers found on board, the destruction of the log-book and other papers, would be a sufficient excuse for the capture, detention and consequent damages. It is only to be considered whether the same principles, as they respect neutrals, are to be applied to this case?

My mind has found much difficulty in settling this question. It is one altogether new to me, and arises from the peculiar imperfect war existing at this time between the United States and France. I have embraced an opinion with much diffidence, and am happy that it may be revised in the superior courts of the United States.

On what principles is the right of belligerent powers to examine neutral vessels, and the duty of neutrals to furnish their ships with proper papers, and to avoid such conduct as may give cause to suspect they are other than they pretend to be, founded? Do they not necessarily result from a compromise of their respective rights in a state of war? Neither of the belligerent powers have an original and perfect right to capture the property of neutrals, but they have a right, unless restrained by treaty, however disguised or covered by the aid of neutrals.¹ It is a breach of neutrality to attempt to defeat this right. The practice of nations, therefore, for many ages, has been on the one hand to exercise and on the other to prevent this examination, and to establish a principle that neutral vessels shall be furnished with the usual

¹It is believed, that there has been an error in copying this passage. It is, however, printed *verbatim* from the transcript of the record. The words to be supplied probably are, "to search for and seize the property of their enemies," to be inserted after the word "treaty."

documents to prove their neutral state; shall destroy none of their papers, nor shall carry false papers, under the hazard of being exposed to every inconvenience resulting from capture, examination and detention, except the eventual condemnation of the property; and even this, by some writers, has been held to be lawful, and enforced by some great maritime powers. Every maritime nation must be involved in the war, on the side of one or the other of the belligerent powers, but from the establishment of these principles. It is not the edicts, statutes or regulations of any particular nation which confer these rights, or impose these duties. They are the result of common practice, long existing, often recognized, and founded on pacific principles. Whenever a state of war exists, these rights and duties exist.

It does not appear to me to be material, what is the nature of the war, general or limited. Nothing can be required of neutrals but to avoid duplicity. Sufficient notice to neutrals of the existing state of hostilities is all that is necessary, to attach to them the duties, and to belligerent nations, the rights, resulting from a state of war. This notice is given in different ways, by proclamations, heralds, statutes published, and even by the mere existence of hostilities for a length of time. As the island of St. Thomas, being a dependency of a neutral nation, situated near the dependencies of the belligerent power with whom the United States had prohibited intercourse, and having had long and full knowledge of the state of things, its inhabitants were, as I conceive, bound not to interfere or attempt to defeat the measures taken by our government, in their limited war. We find, however, that these attempts have been frequent; that American vessels have, in many instances, been covered in that island, and the trade which our government has interdicted has been thus carried on. It behooved, then, those of its inhabitants who would avoid the inconveniences of restraint to act with openness, and avoid fraud and its appearances.

This construction of the state in which the United States are (although I am of opinion that, abstractedly from other considerations, it would give them the rights of belligerent powers), places the neutral powers in no new predicament, nor imposes the necessity of any new documents, or other conduct than they were obliged to from the preexisting state of war between most of the great naval powers. On the whole, I am of opinion that no damages are to be paid the claimants for the capture and detention, and do so decree, and that each party bear their own costs.

From this decree, the claimants appealed to the circuit court, where it was reversed, and \$8,504 damages were given. The following is the decree of the circuit court:

This court having fully heard the parties on the said appeal, finds the facts stated in the said decree to be true, and that the said Little had instructions from the President of the United States, on which the action in the said libel is founded, a copy of which instructions is on file. And it further appearing that the said brigantine and her cargo were Danish, and neutral property, and that the said George Little knew that the said brig, at the time of the said capture, was bound and sailing from Jeremie to St. Thomas, a Danish and neutral port, and not to any French port; this court is of opinion that although Captain Little had a right to stop and examine the said brig, in case of suspecting her to be engaged in any commerce contrary to the act of the 9th of February, 1799, yet that he was not warranted by law to capture and send her to a port of the United States. That it was at his risk and peril, if the property was neutral; and that a probable cause to suspect the vessel and cargo American, will not, in such case, excuse a capture and sending to port. It is, therefore, considered, adjudged and decreed by this court, that the said decree respecting damages and costs be, and it is hereby reversed, and that the said claimants recover their damages and costs.

The damages being assessed by assessors appointed by the court, a final sentence was pronounced, from which the captors appealed to this court.

The cause was argued at December term, 1801, by *Dexter*, for the appellants, and by *Martin* and *Mason*, for the claimants.

February 27th, MARSHALL, Ch. J., now delivered the opinion of the court.—The *Flying Fish*, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December, 1799, on a voyage from Jeremie to St. Thomas, by the United States frigate *Boston*, commanded by Captain Little, and brought into the port of Boston, where she was libelled as an American vessel that had violated the non-intercourse law. The judge before whom the cause was tried directed a restoration of the vessel and cargo, as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American. On an appeal to the circuit court, this sentence was reversed, because the *Flying Fish* was on a voyage from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was

annually passed. That under which the *Flying Fish* was condemned, declared every vessel owned, hired or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority of the French Republic, to be forfeited, together with her cargo; the one-half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same. The 5th section of this act authorizes the President of the United States to instruct the commanders of armed vessels "to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if, upon examination, it should appear that such ship or vessel is bound or sailing to any port or place within the territory of the French Republic or her dependencies, it is rendered lawful to seize such vessel and send her into the United States for adjudication.

It is by no means clear that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited, by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the act which declares that "such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made," obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the *Flying Fish* to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her, had she been really American.

It was so obvious, that if only vessels sailing to a French port could

be seized on the high seas, that the law would be very often evaded, that this Act of Congress appears to have received a different construction from the executive of the United States; a construction much better calculated to give it effect. A copy of this act was transmitted by the secretary of the navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause:

A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

These orders, given by the executive, under the construction of the Act of Congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act, not otherwise excusable, it would then be necessary to inquire, whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral?

I confess, the first bias of my mind was very strong in favor of the opinion, that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle, that those orders, if not to perform a prohibited act, ought to justify the person whose general duty

it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions can not change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the *Flying Fish* to suspect her of being an American, would excuse Captain Little from damages for having seized and sent her into port? since, had she been an American, the seizure would have been unlawful. Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the circuit court, and it must be affirmed with costs.

HALLET & BOWNE v. JENKS AND OTHERS¹

Marine insurance.—Illegal voyage

A vessel belonging to citizens of the United States, in the year 1799, driven by distress into a French port, and obliged to land her cargo, in order to make repairs, and prevented by the officers of the French Government from relading her original cargo, and from taking away anything in exchange but produce or bills, might purchase and take away such produce, without incurring the penalties of the non-intercourse act of June 13, 1798. And such voyage was not illegal, so as to avoid the insurance.

Hallet v. Jenks, 1 Caines, Cas. 43; s. c. 1 Caines, Rep. 64, affirmed.

This was a writ of error to the "Court for the Trial of Impeachments, and the Correction of Errors, in the State of New York," under the act of Congress of the 24th September, 1789, § 25 (1 U. S.

¹ 3 Cranch, 210.

Stat. 85), which gives the Supreme Court of the United States appellate jurisdiction upon a judgment in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the construction of any clause of a statute of the United States, and the decision is against the right, privilege or exemption, specially set up or claimed by either party, under such statute.

The action was upon a policy of insurance, and the only question to be decided by this court was, whether the risk insured was illegal, under the act of Congress (commonly called the non-intercourse law) of the 13th June, 1798 (1 U. S. Stat. 565). For although another question appears to arise upon the record, viz., whether a condemnation in a foreign court, as enemy's property, be conclusive evidence of that fact, yet this court is prohibited by the same 25th section of the act of 1789, to consider any other question than that which respects the construction of the statute in dispute.

On the trial of the general issue, a special verdict was found, containing the following facts:

That on the 27th day of April, 1799, the defendants, for a premium of 25 per cent, insured for the plaintiffs against all risks, \$1,000, upon 25,000 pounds weight of coffee, valued at 20 cents per pound, on board the sloop *Nancy*, from Hispaniola to St. Thomas. That in the margin of the policy was inserted a clause in the following words, "warranted the property of the plaintiffs, all Americans," but that the words "all Americans," were added, after the policy was subscribed; that the sloop *Nancy* was built at Rhode Island, and belonged to citizens of the United States, resident in Rhode Island, as well when she left that State, as at the time of her capture, and being chartered by the plaintiffs, sailed from Newport, in Rhode Island, on the 12th day of December, in the year 1798, on her first voyage to the Havana; that in the course of the said voyage, she was compelled, being in distress, to put into Cape François, in the island of Hispaniola, a country in the possession of France, where she arrived on the 5th day of January, 1799; that the master and supercargo of the sloop were part owners of the cargo, and two of the plaintiffs in this suit; that having so put into Cape François, the cargo was landed to repair the vessel; that the public officers acting under the French Government there, took from them nearly all the provisions on board the sloop, and the master and supercargo were permitted to sell, and did sell, the remainder, to different persons there; that the master and supercargo

made a contract with the public officers, by which they were to be paid for the provisions in thirty days, but the payment was not made; that, with the proceeds of the remaining parts of the cargo, they purchased the whole of the cargo which was on board, at the time of the capture, and also seventeen hogsheads of sugar, which they sent home to New York, on freight; that the said officers forbade the said master and supercargo of the sloop, from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof they were compelled to sell the same, and to take the produce of that country in payment. That the sloop, with 30,000 weight of coffee on board, 25,000 pounds weight of which was intended to be insured by the present policy, sailed from Cape François, on the 23d day of February, in the year last aforesaid, on the voyage mentioned in the policy of insurance, having on board the usual documents of an American vessel; that the sloop, in the course of her said voyage, was captured by a British frigate, and carried into the island of Tortola, and vessel and cargo libelled, as well for being the property of the enemies of Great Britain, as for being the property of American citizens, trading contrary to the laws of the United States; that, at the time of the capture of the sloop, besides the documents aforesaid, the following paper was found on board:

Liberty—Safe Conduct—Equality

At the Cape, 11th Termidor, sixth year of the French Republic, one and indivisible. The general of division and private agent of the executive directory at St. Domingo, requests the officers of the French navy and privateers of the republic, to let pass freely the American vessel called the ———, ——— master, property of Mr. E. Born Jenks, merchants at Providence, State of Rhode Island, in the United States, arrived from the said place to the Cape François, for trade and business. The citizen French consul, in the place where the said vessel shall be fitted out, is invited to fill with her name, and the captain's, the blank left on these presents; in attestation of which, he will please to set his hand hereupon.

(Signed) J. HEDOUVILLE.

GAUTHIER,

the general secretary of the agency.

Which paper was received on board the sloop, at Cape François, and was on board when she left that place; that the property insured

by the policy aforesaid was claimed by the said Zebedee Hunt, and was condemned by a sentence of the said court of vice-admiralty, in the following words: "That the said sloop *Nancy*, and cargo on board, claimed by the said Zebedee Hunt, as by the proceedings will show to be enemy's property, and as such, or otherwise, liable to confiscation, and condemned the same as good and lawful prize to the captors." That the plaintiffs are Americans, and were owners of the property insured, and that the same was duly abandoned to the underwriters.

That part of the act of Congress, which the underwriters contended had been violated by the defendants in error, is as follows:

§ 1. That no ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, after the first day of July next, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction, or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, etc.

The second section enacts, that after the first of July, 1798, no clearance for a foreign voyage shall be granted to any ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, until a bond shall be given, in a sum equal to the value of the vessel and cargo, "with condition, that the same shall not, during her intended voyage, or before her return within the United States, proceed or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by distress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond; and that such vessel is not, and shall not, be employed, during her intended

voyage, or before her return, as aforesaid, in any traffic or commerce with or for any person resident within the territory of that republic, or in any of the dependencies thereof." June 13, 1798. (1 U. S. Stat. 565.)

Mason, for the plaintiffs in error.—If the insurance was upon an illegal transaction, the defendants in error have no right to recover. The only question for the consideration of this court is, whether it be a transaction prohibited by the act of Congress. If the purchase of this cargo in Cape François was lawful, the policy is good.

The first section of the act has two branches, and contemplates two separate offenses: 1st. That no vessel shall be allowed to go to a French port. But this prohibition must be subject to the general principle, that the act of God, or of the public enemy, shall be an excuse. 2d. That if driven into such port by distress, or involuntarily carried in, yet there shall be no trade or traffic. The words are, "if any vessel shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid." The going in must be voluntary, but the legislature carefully omit the word voluntarily, when speaking of the offense of trading, for all trading must be voluntary; it can not be by compulsion. The object was to prevent intercourse, and the statute only makes the same saving of the forfeiture which a court would have made without such a saving clause.

The condition of the bond mentioned in the second section confirms this construction of the first. It is divided into two clauses, agreeable to the two offenses to be provided against. The proviso "unless by distress of weather," etc., is annexed only to the offense of going into the port, but there is no saving or exception as to the offense of trading. If she had not been driven in by distress of weather, she would have been liable to forfeiture, under the first offense. But having been employed in traffic with persons resident, etc., she is equally liable to forfeiture, under the second, and the condition of the bond has been substantially broken.

The special verdict states, "that the master and supercargo were permitted to sell, and did sell, the residue of the cargo, to different persons there." Here was no compulsion. This selling was a violation of the law; but it is not that which avoids this policy. The fault was, that with the proceeds of those sales, the plaintiffs below purchased the cargo insured. There was no compulsion to do this, except

what I shall presently notice, as stated in the verdict. It will probably be contended, that the following words of the verdict show a compulsion, viz., "that the said officers forbade the said master and supercargo from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof, they were compelled to sell the same, and to take the produce of that country in payment." But this is only the reasoning of the jury, and the words, by reason whereof, show what kind of compulsion it was, and that it was not that inevitable necessity which can excuse the express violation of the law. The owners ought to have said to them, if you forbid us to take away our property, we must leave it, and look to our Government for an indemnification; for they have forbidden us to sell it to you, or to purchase a new cargo. The forbidding them to relade their goods, and to take away specie, was no compulsion to purchase produce. The verdict does not state that the master or supercargo attempted to resist the force; it may be wholly a colorable transaction.

The act of the 27th February, 1800 (2 U. S. Stat. 7), shows what the construction of that of 1798 ought to be. The third section of the former provides, that in case the vessel shall be compelled, by distress or superior force, to go into a French port, and shall there necessarily unlade and deliver, or shall be deprived of any cargo then on board, the master may receive payment in bills of exchange, money or bullion, and not otherwise, "and shall not thereby be understood to contravene this law." This is a clear implication, that if there had not been such an express permission to receive payment in bills of exchange, money or bullion, it would have been a contravention of the law; and that law, excepting this provision, is substantially the same as the law of 1798.

Harper, contra.—I might safely agree to the first position taken by the opposite counsel, that the first section of the act of 1798 creates two distinct offenses. But this is not so. The whole constitutes but one offense. How is a ship to be employed in traffic? She must bring and carry. If she did not go voluntarily, she was not employed in trafficking. If the master sell the cargo, under such circumstances, the vessel is not employed in traffic. But if the act creates two separate offenses, how is the vessel employed in the traffic? She did not carry the cargo there voluntarily. But it being there, and landed, neces-

sarily landed, how is the vessel concerned in the sales and purchases made by the master? The necessity of repairing the vessel is as much an excuse for landing the cargo, as stress of weather was for going in. The master was forbidden to relade it. But a difference is taken between prohibition and prevention. It is said, that the forbidding is not preventing. But by whom was the prohibition? By the officers of the Government, having authority and power to carry the prohibition into effect. It was, therefore, actual prevention.

What was the mischief intended to be remedied by the act of Congress? Not such a sale as this. It was to prevent a voluntary intercourse, not to prevent citizens of the United States from rescuing their property from impending loss. What is traffic? A contract by consent of both parties. If one is under compulsion, it is no contract, no traffic. The transaction disclosed by the verdict, is only the means of saving property from a total loss. The owners were not obliged to abandon, as the gentleman contends, property thus put in jeopardy. The master and supercargo were not free agents. They were not obliged to take bills, which they knew would not be paid. If I could have had a doubt upon this case it would have been removed by the decisions of the circuit courts of the United States. In a case before one of your Honors,¹ in Baltimore, a vessel had brought home from the French West Indies, a cargo of the produce of those islands, after having been compelled to go in and sell her outward cargo; and it was decided, that the case was not within this act of Congress. A similar case is understood to have been decided by another of your Honors,² in New York. If those cases were not within the law I am warranted in saying, this is not.

Those decisions produced the third section of the act of 1800, which the gentleman has cited, and which was introduced, to shut the door that had been left open. It was perceived, that the law, as it stood before, would give an opportunity of fraud. The third section was enacted to take away the temptation; because, although there might be cases, clear of fraud, it was thought best to sacrifice these particular cases, that fraud might be prevented in others. This section, therefore, has given a sanction to the decisions of the circuit courts.

¹Judge WASHINGTON.

²Judge PATERSON, in September, 1799, in the case of Richardson and others, cited in 1 Caines' Rep., p. 63.

Key, in reply.—It is clear, that there are two distinct prohibitions in the act. The two parts of the section are connected by the disjunctive “or,” and not by the copulative “and.” This is rendered still more evident, by the form of the condition of the bond described in the second section.

Whenever you rely on the necessity of the case, to justify your acts, you must not go beyond the necessity. All beyond is voluntary. In this case, it might go to the landing, and to the seizure of part, but not to the sale of the residue. The probability of loss is not necessity. If they took produce, it was only to avoid a greater loss. It was not an inevitable necessity. Another fact shows that it was trading; not merely taking on board, to bring home, property which they were compelled to receive. She was not coming home with the property, when she was captured, but going on a trading voyage. And the French pass states that she came to Cape François for trade and business. The intention of the act was to prevent all trading and intercourse with France or her dependencies.

In the case at Baltimore, before his Honor Judge WASHINGTON, the vessel returned directly home to Baltimore, with produce, which she had been compelled to take or abandon.

Mason, on the same side.—It is said, there must be a preexisting intention to go to a French port. If the sloop had arrived safe at the Havana, and been there sold to an agent of the French Government, it is clear, she would have been liable to forfeiture. So, if the French agent, who signed the passport, had freighted the vessel. These cases show that a preexisting intention is not necessary. The construction contended for would, indeed, open a wide door to fraud, as the gentleman has contended. It would only be necessary to start a plank, in sight of the port, and then go in to stop the leak, and the whole law is evaded.

March 6, 1805. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The court is of opinion, according to the best consideration they have been able to give the subject, that this case is not within the act of Congress of 1798, usually called the non-intercourse law.

It is contended by the counsel for the defendant, that the circumstances stated in the special verdict, do not show an absolute necessity

for the trading therein described. And it is said, the plaintiff might have abandoned the property, and sought redress of his government; and that it was his duty to do so, rather than violate the laws of his country. But the court is of opinion, that the act of Congress did not impose such terms upon a person who was forced by stress of weather to enter a French port, and land his cargo, and was prevented by the public officers of that port to relade and carry it away. Even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and purchase a new cargo, I am of opinion, that it would not have been deemed such a traffic with the enemy, as would vitiate the policy upon such new cargo. The terms of the act of Congress seem to imply an intentional offense on the part of the owners.

The case put, of a French agent going to the Havana, and there purchasing the cargo for the use of the French Government, under a preconcert with the owners, would certainly be an offense against the law; but when there is no such intention; when the vessel has been absolutely forced, by stress of weather, to go into a French port, and land her cargo; when part has been seized for the use of the Government of France, and the master has been forbidden by the public officers of the port to relade the residue, and to sell it for any thing valuable, except the produce of the country; the mere taking away such produce, can not be deemed such a traffic as is contemplated by the act of Congress.

Judgment affirmed, with costs.¹

SANDS v. KNOX²

Non-intercourse act

The non-intercourse act of June 13, 1798, did not impose any disability upon vessels of the United States, sold *bona fide* to foreigners, residing out of the United States, during the existence of that act.

Error to the Court for the Trial of Impeachments and the Correction of Errors, in the State of New York.

¹See the opinion of the supreme court of New York, in this case, in 1 Caines' Rep. 64, and that of the High Court for the Trial of Impeachments and Correction of Errors, in the State of New York, delivered by Lansing, Chancellor, in 1 Caines' Cases in Error, p. 43.

²3 Cranch, 499.

Thomas Knox, administrator, with the will annexed, of Raapzat Heyleger, a subject of the King of Denmark, brought an action of trespass *vi et armis*, in the supreme court of judicature of the State of New York, against Joshua Sands, collector of the customs for the port of New York, for seizing and detaining a schooner called the *Jennett*, with her cargo.

The defendant, Sands, pleaded in justification, that he was collector, etc., and that after the 1st day of July, 1798, viz., on the 16th of November, 1798, the said schooner, then being called the *Juno*, was owned by a person resident within the United States, at Middletown, in Connecticut, and cleared for a foreign voyage, viz., from Middletown to the island of St. Croix, a bond being given to the use of the United States, as directed by the statute, with condition that the vessel should not, during her intended voyage, or before her return within the United States, proceed, or be carried, directly or indirectly, to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by stress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond, and that such vessel was not, and should not be, employed, during her said intended voyage, or before her return as aforesaid, in any traffic or commerce with, or for, any person resident within the territory of that republic, or in any of the dependencies thereof. That afterwards, on the 8th of December, 1798, she did proceed, and was voluntarily carried from Middletown to the island of St. Croix, in the West Indies, and from thence, before her return within the United States, to Port de Paix in the island of St. Domingo, being then a place under the acknowledged government of France, without being obliged to do so by stress of weather, or want of provisions, or actual force and violence, whereby, and according to the form of the statute, the said schooner and her cargo became forfeited, the one-half to the use of the United States, and the other half to the informer; by reason whereof, the defendant, being collector, etc., on the 1st of July, 1799, arrested, entered and took possession of the said vessel and cargo, for the use of the United States, and detained them as mentioned in the declaration, and as it was lawful for him to do.

The plaintiff, in his replication, admitted that the defendant was collector, etc., that at the time she sailed from Middletown for St. Croix,

she was owned by a person then resident in the United States; and that a bond was given as stated in the plea; but alleged, that she sailed directly from Middletown to St. Croix, where she arrived on the 1st of February, 1799, the said island of St. Croix then and yet being under the government of the King of Denmark. That one Josiah Savage, then and there being the owner and possessor of the said vessel, sold her, for a valuable consideration, at St. Croix, to the said Raapzat Heyleger, who was then, and until his death continued to be, a subject of the King of Denmark, and resident at St. Croix, who, on the 1st of March following, sent the said vessel, on his own account, and for his own benefit, on a voyage from Port de Paix to St. Croix, without that, that she was at any other time carried, etc.

To this replication, there was a general demurrer and joinder, and judgment for the plaintiff, which, upon a writ of error to the court for the trial of impeachments and correction of errors, in the State of New York, was affirmed. The defendant now brought his writ of error to this court, under the 25th section of the judiciary act of the United States. (1 U. S. Stat. 85.)

The only question which could be made in this court, was upon the construction of the act of Congress, of June 13, 1798 (1 U. S. Stat. 565), commonly called the non-intercourse act; the first section of which is in these words: "That no ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, after the 1st day of July next, shall be allowed to proceed, directly, or from any intermediate port or place, to any port or place within the territory of the French Republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French Republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed, to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned, in any

circuit or district court of the United States, which shall be holden within and for the district where the seizure shall be made."

The condition of the bond stated in the plea, corresponded exactly with that required by the second section of the act. The seventieth section of the act of 2d of March, 1799 (1 U. S. Stat. 678), makes it the duty of the several officers of the customs, to seize any vessel liable to seizure, under that or any other act of Congress respecting the revenue.

C. Lee, for the plaintiff in error.—The question is, whether the act of Congress does not impose a disability upon the vessel itself?

This vessel was clearly within the literal prohibition of the act. She was "owned wholly by a person resident within the United States." She did "depart therefrom, after the 1st day of July (then) next." She did "proceed from an intermediate port or place, to a place in the West Indies, under the acknowledged government of France." She was also a vessel which, "in a voyage thereafter commencing, and before her return within the United States," was "voluntarily carried, or suffered to proceed, to a French port." She had, therefore, done and suffered every act which, according to the letter of the law, rendered her liable to forfeiture, seizure and condemnation.

It is true, that the decision of this court, in the case of the *Charming Betsy*, 2 Cr. 115, seems, at first view, to be against us. But the present question was not made, and could not arise, in that case, because that vessel had not been to a French port, nor had she returned from a French port to the United States. If such a trade as the present case presents were to be permitted, the whole object of the non-intercourse act would be frustrated. A vessel of the United States may, according to the judgment in the case of the *Charming Betsy*, be sold and transferred to a Dane, and he may trade with her as he pleases; but we say, it is with this proviso, that he does not send her from a French port to the United States. He takes the vessel with that restriction. If he trades to the United States, he is bound to know and respect their laws. The intention of the law was not only to prevent American citizens, but American vessels, from carrying on an intercourse with French ports.

The case of the *Charming Betsy* was under the act of February, 1800; but the present case arises under that of 1798, which is very

different in many respects. The opinion in that case, so far as it was not upon points necessarily before the court, is open to examination. Neither the words of the law, nor the form of the bond, make any exception of the case of the sale and transfer of the vessel, before her return. If, therefore, a sale is made, it must be subject to the terms of the law; and although the vessel may not be liable to seizure upon the high seas, yet upon her return to the United States, it became the duty of the custom-house officer to seize her. The law ought to be so construed as to carry into effect the object intended. That object was, to cut off all intercourse with France, and by that means compel her to do justice to the United States. But if this provision of the law is to be so easily eluded, France will be in a better situation than before, for she will receive her usual supplies, and we shall be weakened by the loss of the carrying trade.

Bayard, contra, was stopped by the court.

MARSHALL, Ch. J.—If the question is not involved, whether probable cause will justify the seizure and detention; if there are no facts in the pleadings which show a ground to suspect that there was no *bona fide* sale and transfer of the vessel, the court does not wish to hear any argument on the part of the defendant in error. It considers the point as settled by the opinion given in the case of the *Charming Betsy*, with which opinion the court is well satisfied. The law did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after a *bona fide* sale and transfer to a foreigner.

Judgment affirmed.

Judgments of the Court of Claims of the United States

WILLIAM GRAY, ADMINISTRATOR, v. THE UNITED STATES¹

[No. 7, French Spoliations. Decided May 17, 1886]

On the Proofs

The treaties of 1778 bind America and France in reciprocal obligations looking to independent sovereignty for the one and certain exclusive privileges for the other. Subsequent to the peace of 1782 the French revolutionary government charges violations of the treaty in not according to France her exclusive privileges, and on the publication of the Jay treaty, 1795, breaks off diplomatic relations. Between 1791 and the treaty of 1800 France is guilty of depredations on American commerce in violation both of treaties and the law of nations. A state of partial, maritime war exists. In 1800, negotiations being renewed, the French Government demands restoration of the exclusive privileges and indemnity for their withdrawal. The American offers 8,000,000 francs to be released, but insists on indemnity for its citizens. Finally the treaty of 1800 is ratified with both pretensions stricken out, France renouncing her claim for the treaty privileges and America her claim for the wrongs done her citizens. In 1885 an act is passed authorizing American citizens having "*valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations,*" prior to the treaty of 1800, to bring suit, and directing this court to "*determine the validity and amount*" thereof.

- I. The power of this court to grant redress in the French spoliation cases is necessarily limited by the terms of the *Act of January 20, 1885* (23 Stat. L. 283), conferring jurisdiction.
- II. The act casts upon the courts the duty of determining judicially both that the French seizures were "*illegal*" and the American claims are "*valid.*"
- III. The treaties of alliance and commerce with France 1778, having been concluded upon the same day and the result of the same negotiation and signed by the same plenipotentiaries, are in diplomatic effect one instrument.
- IV. The treaty of commerce assured to France exclusive privileges; the treaty of alliance cast upon the American Government the obligation

¹ Court of Claims Reports, vol. 21, page 340.

of maintaining French possessions in America; the Jay treaty of 1795, granting the same commercial privileges to England, necessarily conflicted with the French treaties.

- V. A judicial tribunal must treat the facts of a former international dispute only as they affect private rights. Its decision can not properly be regarded as a reflection upon the treaty-making power.
- VI. A seizure upon the high seas of an American vessel bound for a neutral port on the alleged ground of her having violated French regulations "*concerning the navigation of neutrals*," was an illegal seizure, and the claims resulting therefrom a valid claim, for which the American Government was morally bound to demand redress.
- VII. Concerning the question whether war existed between America and France prior to the treaty of 1800 and the nature and extent thereof, the judicial department must follow the political.
- VIII. The acts of 1798 and 1799, the declarations and actions of the Executive, and the conduct and assurances of the two Governments conclusively show that while there was a limited maritime war (in its nature a prolonged series of reprisals), nevertheless no state of public general war existed, such as would abrogate treaties, suspend private rights, or authorize indiscriminate seizures and condemnations.
- IX. The claims which the French Government renounced by the treaty of 1800 were national; those which our Government renounced were individual; and the reciprocal renunciation constituted the bargain effected by the treaty of 1800.
- X. All claims urged by one nation upon another are technically national; but there is a distinction between claims founded upon injury to the whole people and those founded upon injury to particular citizens.
- XI. The bargain whereby this Government obtained the renunciation of the French claims against itself, and the relinquishment of its obligations under the treaty of 1778, brings these cases within the provision of the Constitution, that "private property shall not be taken for public use without just compensation."
- XII. The claims renounced by the treaty of 1800 were unliquidated demands for wrong and injury; the debts provided for by the treaty of 1803 were obligations in the nature of contract, or for captures as to which restitution had been ordered by the council of prizes. Therefore the latter treaty does not extend to the former demands.
- XIII. The attempt of the French Government to regulate by its own decrees the conduct of neutral merchantmen upon the high seas was contrary to the law of nations and void; and the seizure of an American vessel on the alleged ground that her "*rôle d'équipage*" was not in the form prescribed by French law was illegal.
- XIV. A citizen must exhaust his remedy in the courts of a foreign power before he can call upon his own Government for diplomatic redress;

but the decision of the foreign tribunal is not final, being the very beginning of the international controversy; and the doctrine is applicable only where the courts are open and the citizen free to seek redress.

- XV. The treaty of 1819 with Spain does not extend to the French spoliation cases.
- XVI. The treaty of 1831 with France does not extend to the claims renounced and, from an international point of view, extinguished by the treaty of 1800.
- XVII. Whether the *Act of May 28, 1798* (Stat. L. 561), abrogated the treaty of 1778 is an immaterial question here, inasmuch as the claims rest on the violation of neutral rights under the law of nations.
- XVIII. The *French Spoliation Claims Act, 1885* (23 Stat. L., § 3, p. 283), while requiring this court to determine the "*present ownership*" of a claim, does not require it to act as a court of probate and settle estates of deceased owners. Hence an action may be maintained by an administrator.

The Reporters' statement of the case:

This is the leading French spoliation case, but at the time when it was brought before the court a number of cases were presented by the various counsel, whose names are given below, and the general question of the Government's liability, and the general principles more or less applicable to all of these cases, were discussed at great length.

The decision was understood to be final as to this case, but no order was entered at the time of its rendition.

Mr. William Gray for the claimant, William Gray, administrator.

Mr. William E. Earle (with whom was *Mr. Samuel Shellabarger*) for the claimant, F. K. Carey.

Mr. Fisher Ames for the claimant, Fisher Ames, administrator.

Mr. Leonard Myers for various claimants residing in Philadelphia.

Mr. Lawrence Lewis, Jr., for the same and other parties.

Mr. J. Hubley Ashton for the city of Philadelphia.

Mr. Benjamin Wilson for the defendants.

DAVIS, J., delivered the opinion of the court:

This claim, one of the class popularly called "French spoliations," springs from the policy of the French revolutionary government be-

tween the execution of King Louis XVI and the year 1801, a policy which led to the detention, seizure, condemnation, and confiscation of our merchant vessels peacefully pursuing legitimate voyages upon the high seas. Over ninety years have these claims been the subject of discussion and agitation, first between the two nations, and then between the individuals injured and the Government of the United States. Prolonged and heated negotiation resulted in the treaty of 1800, by which, it is urged on behalf of the claimants, their rights were surrendered to France for a consideration valuable to this Government. The claims being valid obligations admitted by the French Government, they contend that the United States, through this agreement, in which demands of the one nation were set off against those of the other, assumed as against their citizens these obligations and should pay them. This position is denied by the Government, which in addition presents other defenses based upon subsequent transactions between the two countries, urging that thereby were destroyed any beneficial rights possibly vested in the claimants, if their contention as to the treaty of 1800 be correct.

The act sending the claims to this court, while the third that has passed both Houses of Congress, is the first that has received the approval of a President, as one was vetoed by President Polk, another by President Pierce, while this, the third, was signed by President Arthur.

Whatever the rights of the claimants, they are without remedy other than that which Congress may have seen fit to give them; and our power to grant redress, be our opinion as to the justice of their claims what it may, is limited by the terms of the remedial statute. The force and effect of the act, by virtue of which the claimants appear at this bar seeking relief, must then be examined at the threshold of the discussion. The act authorizes "citizens of the United States or their legal representatives," having "valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations," prior to the ratification of the convention of 1800 with France, to apply here within a time limited (§ 1), that (§ 3) this court may "examine and determine the validity and amount" of their claims, the present ownership, and, if owned by an assignee, certain details in regard thereto. The act excludes from its benefits claims embraced in certain conventions with France and Spain, concluded in 1803, 1819, and 1831, and with pro-

visions as to rules of court, defense of the United States, evidence and other matters not important for our immediate purpose, directs this court, as to the claims thus placed within our jurisdiction, to report to Congress the first Monday of each December the facts found by us and our conclusions, which are to be taken, both as to law and facts, as advisory and not conclusive upon either party, the claimants or the Government.

So peculiar a jurisdiction was probably never before conferred upon a strictly judicial tribunal. The rights of the claimants, if any exist, arise from the acts of the political branch of the Government done in the protection and aid of the nation. For such rights there can be no remedy other than that granted by the legislature; in this instance the legislature has elected to transmit to the judiciary, under certain restrictions, the examination of the claimants' demands, with the proviso that the conclusion reached in this forum shall not be finally binding upon either party, but that the defendants, as well as the claimants, have reserved to them an appeal, not in the regular line of judicial procedure to the Supreme Court of the United States, but back again to that body, from which alone any remedy can come to the citizen for wrongs done him by his Government.

The reason for this peculiar grant of remedy is found in the nature of the claims, which spring from international controversies of the gravest character intimately entwined with the history of our struggle for independence; also in the age of the claims; and, lastly, in the absolutely indeterminate amount of financial responsibility which will be thrown upon the Government should the claims be found to exist as valid obligations due from the United States to their citizens. Good or bad, not one of these claims is enforceable but by the consent of the Congress, and the Congress can affix to that consent such condition as in their wisdom seems just and for the best interests of the Republic. The remedy now granted is an examination and advisory report by the judiciary, to be followed by a decision by the legislative branch of the Government.

It has been said that the validity of the claims as a class is admitted by the act, and this court should confine the examination to each individual claim for the purpose only of determining whether it falls within the class. This is understood to be in effect the argument on behalf of some of the claimants. Our labor and responsibility would be greatly lightened could we agree with this proposition, but the act

of Congress seems clearly to negative the contention, and to throw upon us the duty of investigating the validity of these claims against France and the assumption of them by the United States. It requires us to examine, not claims in a specified category or known by a generic name, not even "claims" simply, but "valid" claims against France, and valid claims arising not merely from captures, detentions, seizures, condemnations, and confiscations, but from acts of this nature which were "illegal." The validity of the claims, as against France, is the very first condition imposed by the legislature upon the grant of remedy. The claims must have been "valid" obligations existing at the time and which this Government had the right to enforce diplomatically before they come within the purport of the statute. To grant as correct the contention that we are to examine in each case whether, and only whether, the seized or detained vessel had violated the law of nations or the treaties—as, for illustration, drawn from the argument, whether she carried contraband of war, or attempted to break an actual blockade, or failed to carry proper papers—if we are to examine only into this, then effect is perhaps given to the word "illegal," found in the statute defining the nature of the acts from which the claims arise, but the word "valid," of equal if not superior force, is entirely ignored.

Clearly Congress expects from us an opinion as to the validity of claims of this class as against France, and the third section of the act, which requires us to receive "historic and documentary evidence," "to decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same," and to report "all such conclusions of fact and law as in [our] judgment may affect the liability of the United States therefor," is not only confirmatory of this conclusion, but obliges us to go further and to examine into the resultant liability claimed to exist in the Government of the United States to compensate the claimants for the injuries alleged to have been sustained at the hands of the French Republic. This involves an examination of the history of the relations between the two countries from 1777, when negotiations for the treaties of alliance and commerce began, as the whole contention starts with the treaties of 1778 with France, which came to us during the darkest hours of the struggle for independence, and when we were hoping against hope for the aid which there was no prospect of receiving.

Burgoyne had capitulated, Howe had been driven from New Jersey,

and, after the drawn battle of Germantown, was shut up in Philadelphia, where the ease and luxury of a city camp were but occasionally interrupted by an excursion against the enemy on land or an encounter upon the river. Curiously enough, at the end of a successful campaign, the American cause was, barring the indomitable spirit of the patriots, in the direst straits.

Gates, excited by his success at the north and become the president of the executive board of war, had broken with Washington and had used his influence successfully in securing the appointment as inspector-general, against Washington's earnest protest, of a man who had openly defied the commander-in-chief. Washington's army of less than nine thousand men, lying at Valley Forge, was violently assailed by the State of Pennsylvania for not prosecuting an active winter campaign, while even in Congress, to which the remonstrance of the State's council and assembly had been addressed, there was deep discontent as to the policy of the commander-in-chief and sharp criticism upon his conduct. In Philadelphia the British, lodged in comfortable houses, were surrounded by every luxury which a full purse and communication with the outer world could afford; while in the Continental camp, as Washington wrote to Congress, the army was so reduced by cold and starvation, that unless some capital change took place it must "starve, dissolve, or disperse." In Philadelphia there was every comfort and almost every means of dissipation; at Valley Forge nearly three thousand men were unfit for duty because they were barefooted "and otherwise naked" (Sparks's Washington, vol. 5, pp. 197-203), while many were in the hospitals and farm-houses wanting clothes and shoes (*ibid.*). So desperate was the situation that General Huntington preferred fighting to starving, his brigade being out of provisions, while General Varnum, quoting the saying of Solomon that "hunger will break through a stone wall," added, "three days successively we have been destitute of bread; two days we have been entirely without meat. The men must be supplied or they can not be commanded." (*Ibid.* 193.)

This condition of his severely-tried army Washington represented to Congress eloquently and repeatedly. Practically that body did nothing to remedy the evil, but on the other hand, suggested the propriety of attacking Philadelphia, while an expedition of 1,000 men was, against Washington's judgment, detached for an invasion of Canada; an expedition abundantly supplied with commanders in the

persons of three major-generals, but unfortunately lacking in such necessary military details as food, clothing, and transportation. (Bancroft, vol. 9, ch. 27.) The financial condition of the country was in harmony with the physical condition of the army, and the issue of eight and one-half millions of paper money caused an enormous depreciation in the value of the currency, increased the feeling of financial insecurity and necessarily impaired the credit of the Government. The army was small, insufficiently fed, paid, and clad; before them was a strong, rich, and prosperous enemy; the Government was weak, the currency suspected, while disaffection, discontent, and jealousy were prevalent among the highest officers.

Such was the close of the year 1777 at home. Hardy, determined, patriotic, self-sacrificing as the sturdy revolutionists were, probably some way would have been found out of these apparently overwhelming misfortunes; how, no one at that time could possibly foresee. Relief was, however, after weary waiting, to come from a quarter where it had long been expected with hope constantly deferred.

Franklin had early established indirect and secret relations with the court of France through his friend Dumas, a Swiss man of letters residing chiefly in Holland, who was a devoted adherent of the American cause, and who early advised an alliance with France and Spain, it being to their interest that the United States should be independent of England, "whose enormous maritime power [filled] them with apprehensions." In 1776 Silas Deane was sent out as a political agent, and he soon opened secret and informal relations with the French department of foreign affairs. He could not succeed in obtaining from France any open action, but his purchase of munitions of war and supplies, and his many other acts in direct violation of strict neutrality were permitted, winked at, and encouraged. He was told that it was for the interest of both countries "to have the most free and uninterrupted intercourse," but that, the understanding with Britain being good, there could not be recognition of the shipping of military supplies and stores.

Practically in this condition did matters remain after the arrival of the commissioners (Franklin and Lee), although they also constantly pressed the argument contained in the instructions to Deane, namely: France is the country it is fittest for us to obtain and cultivate; the commercial advantages Britain has enjoyed with the colonies have greatly contributed to her wealth and importance; a great part of that

commerce will fall to France, especially (and here is the key of the negotiation) if she favors us now, for our trade is rapidly increasing, our population is rapidly increasing, we are waxing strong and rich, with a great future before us; why not step in now, even at the cost of war with England, a war which under any circumstances you momentarily expect.

French popular sentiment was with us, but to the popular clamor, delicately excited by the astute diplomacy of Franklin and his colleagues, was opposed the clear and calm judgment of the King's advisers, men who conceived it their duty to obtain for their master every advantage possible from the struggling colonies at the least possible expense and risk. Supplies and stores were furnished, but the assistance was not acknowledged; munitions of war found their way across the Atlantic, while the fact was denied to England, and although some of these very supplies came from the arsenals of the Government, that fact even was denied to our own representatives who had forwarded them, and who, as matter of course, knew as much of the transaction as the minister who permitted and disavowed it. Day after day without tiring did Dumas, Deane, Franklin, and Lee press for open action on the part of France. Steadily did they receive promises and secret aid, but always were they postponed as to the great step which should produce France openly to the world as the ally of the colonies and the avowed enemy of England. Before the eyes of Count Vergennes was successfully dangled the bait of a practically exclusive share in American commerce, but still he hoped to secure this advantage without an open rupture with England.

In this condition did matters rest until the news arrived of Burgoyne's defeat. This news, which reached France early in December, 1777, "apparently occasioned as much general joy as if it had been a victory of their own troops over their own enemies." (The commissioners to Committee on Foreign Affairs, Paris, December 18, 1777.) The negotiations instantly took so long a stride forward that before the 18th of December it was decided to conclude a treaty of amity and commerce, the King becoming fixed in his determination to acknowledge and support the independence of the colonies by every means in his power. Nothing could be more generous and liberal than the whole tone and manner of the French negotiation from this time. Once decided and committed as to the policy of openly supporting the colonies, there were no half-spirited measures, no halting at petty de-

tails, no discussion of unimportant trifles, but a generous and open support; nevertheless, it was not until Gates's victory at Saratoga had seemed to turn the tide of events, and while still in ignorance of the want and suffering at Valley Forge, that this action, so vital to the future of the American Republic, was taken. The war for independence was with the assistance of France prosecuted to a successful issue, and at Yorktown the surrender of Cornwallis was made to the combined arms of Washington and Rochambeau under the guns of the fleet of De Grasse.

This brief view of the situation, rehearsing, as it does, details of most familiar history, is only of importance as it relates to what may be called sentimental points made in the argument. The treaties of 1778 were made in obedience to a popular demand in France; they were made for a consideration then deemed valuable by France, and at a moment which then seemed opportune to France; but they came to us when the tide was apparently turning against us, and the aid they promised was generously given us.

The 30th day of November, 1782, provisional articles of peace, acknowledging the thirteen former colonies "to be free and independent," were signed at Paris by the representatives of the United States and Great Britain; the 20th of January, 1783, a cessation of hostilities was declared, and the 3d of September, 1783, the definitive treaty of peace was concluded. France had thus given the major portion of the consideration offered by her for the contract of 1778, and the United States were free, sovereign, and independent, as she had stipulated they should be.

The treaties of 1778 were two in number; that of "alliance," the one of most immediate, and, in fact, at the time, of absolutely vital importance to the United States; and that of "amity and commerce." While separate instruments, they were concluded upon the same day, were the result of the same negotiation, signed by the same plenipotentiaries, and are, in diplomatic effect, one instrument. The treaty of alliance, after referring to its companion, the treaty of commerce, states that the two powers "have thought it necessary to take into consideration the means of strengthening the engagements therein made," and of "rendering them useful to the safety and tranquillity of the two parties; particularly in case Great Britain, in resentment of that connection, . . . should break the peace with France, either by direct hostilities or by hindering her commerce and naviga-

tion in a manner contrary to the rights of nations and the peace subsisting between the two crowns;" and the two powers resolving in such case to join against the common enemy determined upon the treaty, which provided that if war should break out between France and Great Britain during the war for American independence, each party should aid the other according to the exigencies, as good and faithful allies; that the essential end of the alliance, called a "defensive" alliance, was the "liberty, sovereignty, and independence, absolute and unlimited, of the United States."

Provision was also made for a possible conquest of Canada, Bermuda, and the islands in the Gulf of Mexico, and each party was forbidden to conclude a truce or peace with Great Britain without the consent of the other. It was further agreed that neither should lay down arms until the independence of the United States was assured by treaties terminating the war. No claim was to be made by one against the other for compensation, whatever the result, and then came the guaranty, out of which afterwards arose so serious complications, national and international, which not only drove our country, weak and exhausted from seven years' strife, to the verge of war, but also stirred up at home a bitter political contest, carried even into the intimacy of a President's Cabinet.

These stipulations are contained in the eleventh and twelfth articles, whereby each party guaranteed "forever against all other powers"—first, the United States to France: all the possessions of France in America as well as those it might acquire by any future treaty of peace; second, France to the United States: "their liberty, sovereignty, and independence, absolute and unlimited," together with their possessions and their additions or conquests made from Great Britain during the war. Such, in substance, was the treaty of alliance; it has never been contended, so far as known to us, that France did not fulfill the requirements which this instrument imposed upon her during our contest with Great Britain.

The provisions of the other agreement, the treaty of commerce, of importance in this case (alluding to them briefly) required protection of merchantmen; required ships of war or privateers of the one party to do no injury to the other; and provided especial, purely exceptional, and exclusive privileges by each party to the other as to ships of war and privateers bringing prizes into port.

The treaty of alliance was not one-sided, for it imposed upon the

United States a possible duty and burden in the fulfillment of the guaranty of French possessions in America "forever" against all other powers. This issue was presented without delay. The French revolution began; in 1793 the King was beheaded, when France was instantly brought face to face with the powers of Europe, and her possessions in America were soon wrested from her.

England was in the vanguard of the war, and concluded twenty-three treaties with her allies, in which they agreed to starve out the common enemy. To this end was it stipulated that all the ports should be shut against France; that no provisions should be permitted to be exported to France, and that these measures should be continued and others employed for the purpose of injuring French commerce and to bring that nation to just conditions of peace. (Treaty between Great Britain and Prussia, July 14, 1793.) The animus of the alliance is further shown in the instruction of the Czar, who directed his admiral, in fulfillment of stipulations with Great Britain, to prevent the French from receiving supplies, and to that end to seize all French vessels and to send back to their own ports all neutral vessels bound to France, stating that while these measures were not "strictly conformable to the natural laws of war" they were justifiable when employed against "those arrant villains, who have overturned all duties observed towards God, the laws, and the Government; who have even gone so far as to take the life of their own sovereign."

All Europe, except Sweden and Norway, was now arrayed against the new Republic in a bitterness of warfare scarcely with parallel, and which openly descended to an attempt to starve the French people into submission through an attack upon neutral commerce, a course admittedly unjustified by the laws of war. Naturally France looked to the United States for aid, relying upon the pledge of the treaty of 1778 and the assistance rendered us in our scarcely-concluded struggle by her fleet, armies, and treasury.

The commercial relations between France and the United States were already most unsatisfactory. Exceptional favors granted the United States in 1787 and 1788 (*Foreign Relations*, vol. 1, pp. 113-116) and had been withdrawn and the equality upon which French and British vessels were put in our ports had excited jealousy. "No exceptional advantages had come to France from the war of the revolution, and American commerce had reverted to its old British channels." (*Treaties and Conventions*, etc., Bancroft Davis, 985.)

Jefferson, who had been transferred from the legation in Paris to the office of Secretary of State, endeavored to secure the conclusion of a new commercial treaty, but unsuccessfully, and in April, 1792, we find him instructing Mr. Morris that "it will be impossible to defer longer than the next session of Congress some counter regulations for the protection of our navigation and commerce. I must entreat you, therefore, to avail yourself of every occasion of friendly remonstrance on this subject. If they wish an equal and cordial treaty with us we are ready to enter into it." (Jefferson's Works, vol. 3, p. 356.) In June he again writes that "we can not consent to the late innovations without taking measures to do justice to our own navigation" (*ibid.* 449), and after the imprisonment of the King he informed Morris that some matters, such "as reforming the unfriendly restrictions on our commerce and navigation," might be transacted even by the revolutionary government, as a government *de facto*. (*Ibid.* 489.)

The new French minister, M. Genet, started for the United States in the spring of 1793 armed with three hundred blank commissions "to distribute to such as [would] fit out cruisers in our ports to prey on the British commerce." (Foreign Relations, vol. 1, p. 354.) Finally, the condition of affairs caused by the war led to the President's proclamation of neutrality, from which, curiously, and by way of compromise, the word "neutrality" was omitted. (Jefferson's Works, vol. 3, p. 591.)

Genet arrived in the United States the 8th of April, and on the 22d of that month the proclamation was issued declaring that "the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent powers."

Already at Charleston, where he landed, Genet had commissioned privateers and sent them to sea, asserting this action to be authorized by the treaty of 1778, and informing the Secretary of State of his wish that the Federal Government "should observe, as far as in their power, the public engagements contracted by both nations; and that by this generous and prudent conduct they will give at least to the world the example of a true neutrality which does not consist in the cowardly abandonment of their friends in the moment when danger menaces them, but in adhering strictly, if they can do no better, to the obligations they have contracted with them." (Foreign Relations, vol. 1, p. 151.)

In September following Genet asked for fire-arms and cannon to protect the French possessions guaranteed by the United States, but he was answered by the Secretary of War, with what he terms "an ironical carelessness," that "the principles established by the President in his proclamation did not permit him to lend us so much as 'a pistol.'" (Senate Doc. 102, 19th Cong., 1st sess., p. 219.)

The French law of May 15, 1791, which "inhibited Americans from introducing, selling, and arming their vessels" in France, and "from enjoying all the advantages allowed to those built in the ship-yards of the Republic," was suspended by the national convention the 19th day of February, 1793, when extensive privileges were granted our commerce (*ibid.* 35), but in less than three months (9th May, 1793), seventeen days after the date of the President's proclamation, but before news of its contents could have been received, the National Convention issued a decree ordering the arrest of any neutral vessels laden with provisions bound to an enemy's port. That this was an open and palpable violation of neutral rights was not denied, for it was a measure understood to be retaliatory to the course pursued by Great Britain, and compensation was promised to those neutrals who should suffer by its operation. (*Ibid.* 42.)

This decree of May 9, 1793, authorized French vessels of war and privateers to arrest neutral vessels laden with provisions, the property of neutrals, but destined to an enemy's port, or laden with enemy's merchandise, the merchandise to be prize, and the neutral provisions to be paid for, together with proper freight and indemnity for delay. The 23d of the same month American vessels were exempted from the operation of this decree (Foreign Relations, vol. 1, p. 244); five days later this second decree was suspended; July 1 it was again put in force; and July 27 it was repealed, leaving the decree of May 9 finally in force as against American commerce. (*Ibid.*, vol. 3, p. 284.) Our minister remonstrated, and the national assembly vacillated; nevertheless the decree was executed in plain and admitted violation of neutral rights.

The decree of May 9, 1793, and that of November 18, 1794, directed the seizure of neutral vessels containing enemy's goods, although the treaty of 1778 expressly provided that "free ships make free goods" (Art. 23, Treaty of Commerce); and further, under an ordinance of 1744, revived for the purpose, a foreign vessel having on board a supercargo or officer from an enemy's country, or whose crew was by more

than one-third subjects of an enemy, was adjudged prize. Mere clearance for some of the West India Islands, by decree of February 1, 1797, subjected neutral vessels to capture and confiscation; the decree of January 18, 1798, issued by the council of five hundred, condemned neutral vessels carrying any British merchandise, and March 2, 1797, came into force the requirement of the crew list or "*rôle d'équipage*," which will be more fully considered hereafter. (Doc. 102, p. 160.)

President Washington, in 1793 (message December 5), spoke of the vexations and spoliations understood to have been committed on our vessels and commerce by the cruisers and officers of some of the belligerent powers as requiring attention, and suggested that, on receipt of proofs, "due measures would be taken to obtain redress of the past and more effectual provisions against the future;" whereupon proof began immediately to be furnished.

Before this, the Secretary of State, then Mr. Jefferson, had advertised to the world assurances of governmental protection and aid.

I have it in charge from the President [he said in his circular of August 27, 1793,] to assure the merchants of the United States concerned in foreign commerce or navigation that our attention will be paid to any injuries they may suffer on the high seas or in foreign countries, contrary to the laws of nations and existing treaties, and that on their forwarding hither well authenticated evidence of the same, proper proceedings will be adopted for their relief.

Mr. Morris had already brought to the attention of the French minister of foreign affairs "the obnoxious acts of the late assembly," but without securing redress, as the "attention of the Government was too strongly directed towards itself" to think of exterior interests, "and the assembly, at open war with the executive, would certainly reject whatever should now be presented to them." (Doc. 102, p. 31.)

Meantime our relations with Great Britain had become extremely threatening, various questions growing out of the revolution still remained unadjusted, and when the instructions given by the admiralty, June 8, 1793, became known in the United States it was felt that decisive action could not be longer delayed. These instructions directed the commanders of His Majesty's ships of war and privateers to seize all vessels loaded with corn, flour, or meal bound to any port in France.

or to any port occupied by French armies, and to send the vessels thus seized into any convenient harbor that the cargo might be purchased by the British Government and the ships released; also to seize all ships, whatever their cargo, bound to a blockaded port; also to warn off under penalty of seizure any vessel destined to a port not actually blockaded, but "declared" to be blockaded. (Foreign Relations, vol. 1, p. 240.)

Great Britain, when complaint was made of these orders, attempted to justify them upon the insufficient plea that provisions were contraband of war. (Foreign Relations, vol. 1, pp. 240; 448 *et seq.*) Correspondence leading to no prospect of a satisfactory result, the President nominated Mr. Jay as minister, saying to the Senate (April 16, 1794), that "as peace ought to be pursued with unremitted zeal before the last resource, which has so often been the scourge of nations, and can not fail to check the advanced prosperity of the United States, is contemplated," he had concluded to take this action. (*Ibid.* 447.) The instructions given Mr. Jay are not of importance in this connection, as it is sufficient to note the result of his negotiation in the treaty which bears his name, and to compare its important provisions with our agreement made in 1778 with the King of France.

We had promised France that their ships of war and privateers might freely carry whithersoever they pleased the ships and goods taken from their enemies; that these prizes should not be arrested or seized, or examined, or searched in our ports, but might at any time freely leave, while no shelter or refuge was to be given to vessels having made prize of her "subjects, people, or property." (Art. 17, Treaty of Commerce, 1778.) The United States had thus given France, and for consideration, not only a valuable, but an exclusive right; yet the Jay treaty, in the twenty-fifth article, gave these same privileges to Great Britain, excluding all vessels which "should have made prize upon [her] subjects."

The conflict of the treaties is evident and of course was fully appreciated at the time.

While the Jay treaty was concluded in November, 1794, its ratifications were not exchanged until October the following year, and meantime the British orders in council directing seizure of our vessels and provisions bound to France were so enforced as to call forth from Mr. Randolph, then Secretary of State, the warning, as late as July, 1795, that the Jay treaty had not yet been ratified by the President;

"the late British order in council for seizing provisions is a weighty obstacle to ratification. I do not suppose that such an attempt to starve France will be countenanced." (Foreign Relations, vol. 1, p. 719.) Every endeavor was made by the United States to secure a repeal of the admiralty order, but without success, and finally our minister in London, Mr. Adams, was instructed that if, after every prudent effort, he found it could not be removed, its continuance was not to be an obstacle to the exchange of ratifications. The order was not removed or modified; nevertheless ratifications of the treaty were exchanged the following October.

It should here be noted that soon after the exchange a commission was organized which, among other subjects, was to ascertain the amount of the claims of American citizens on Great Britain for captures made in violation of international law. After various interruptions the labors of this tribunal closed in February, 1804, when awards considerably exceeding a million and a quarter pounds sterling had been made in favor of the United States on account of these claims. (*Treaties and Conventions*, etc., Bancroft Davis, 1014-1016.) This commission existed by virtue of the sixth and seventh articles of the Jay treaty, the latter of which provided that whereas complaints had been made by citizens of the United States that during the course of the war "in which His Majesty is now engaged they have sustained considerable losses and damage by reason of irregular or illegal captures or condemnations of their vessels and other property under color of authority or commissions from His Majesty," it was agreed that where adequate compensation could not then be actually obtained in the ordinary course of justice full compensation would be made by the British Government.

Note further that these claims were for spoliations committed by England to starve the French, as the claims now before us are for spoliations committed by France to feed her people, and, again, remember, by way of explanation, that the remedy alluded to in the Jay treaty as being perhaps obtainable in due course of justice, was a possible recovery by the captured vessel in an action against the privateer upon his bond.

Mr. Morris, proving unacceptable to the French Government, was recalled at their request, and succeeded by Mr. Monroe, who endeavored to secure from his colleague, Mr. Jay, information as to the latter's negotiation, which was refused, as Monroe declined to pledge

himself not to communicate it to the French Government. (Foreign Relations, vol. 1, pp. 517, 700.) France was restive under the situation, and, shortly after the ratification of the treaty, asked whether the President had caused orders to be given to prevent the sale of prizes conducted into the ports of the United States by vessels of the Republic or privateers armed under its authority. As to this question the Secretary of State informed the President:

That the twenty-fifth article of the British treaty having explicitly forbidden the arming of [French] privateers, and the selling of their prizes in the ports of the United States, the Secretary of the Treasury prepared, as a matter of course, circular letters to the collectors to conform to the restriction contained in that [article of the British treaty] as the law of the land. This was the more necessary, as formerly the collectors were instructed to admit to an entry and sale the prizes brought into our ports by the French.

The Secretary also wrote our minister in London that orders had been given to prevent the sale of prizes brought into United States ports by French privateers, "conformably with the twenty-fifth article" of the Jay treaty. So we had finally and openly transferred any exclusive rights of France under the treaty of commerce to her bitter enemy, Great Britain.

But we had another obligation towards our former ally, that of guaranteeing her West India Islands.

Long prior to this (December 11, 1787) Jefferson, while in Paris, had told the British minister there, during a discussion as to the effect of the treaties of 1778, in case of war between France and Great Britain, and told him "frankly and without hesitation," that the dispositions of the United States would then be neutral, and that this would be to the interest of both powers, because it would relieve both from all anxiety as to feeding their West India Islands; that England, too, by suffering us to remain so, would avoid a heavy land war on our continent, which might very much cripple her proceedings elsewhere; that our treaty [with France] indeed obliged us to receive into our ports the armed vessels of France, with their prizes, and to refuse admission to the prizes made on her by her enemies; that there was a clause, also, by which we guaranteed to France her American possessions, and which might perhaps force us into the war if these

were attacked. "Then it will be war," said the minister, "for they will assuredly be attacked."

In 1790 another American minister informed the English secretary of state for foreign affairs "that in a war between Great Britain and the House of Bourbon (a thing which must happen at some time) we [the United States] can give the West India Islands to whom we please, without engaging in the war ourselves, and our conduct must be governed by our interest" (Wait's American State Papers, vol. 10, p. 97); and this in face of a treaty concluded but twelve years before wherein we pledged ourselves to a guaranty "forever" of the possessions in America of that very House of Bourbon. Early in 1794 Mr. Jefferson, then Secretary of State, said, as to this subject, that he had no doubt we should interpose at the proper time "and declare both to England and France that these islands are to rest with France, and that we will make a common cause with the latter for that object." (Jefferson to Madison, April 3, 1794, Jefferson's Works, vol. 4, p. 103.)

The understanding, therefore, seems to have been clear, yet the West India Islands went to England.

The French spoliations began heedlessly through the mistaken action of subordinates, who confounded Americans with English, because of the identity of race and language. In October, 1793, Mr. Deforgues wrote to Mr. Morris:

We hope that the Government of the United States will attribute to their true cause the abuses of which you complain, as well as other violations of which our cruisers may render themselves guilty in the course of the present war. It must perceive how difficult it is to contain within just limits the indignation of our marines, and, in general, of all the French patriots, against a people speaking the same language and having the same habits as the free Americans. The difficulty of distinguishing our allies from our enemies has often been the cause of offenses committed on board your vessels. All that the administration can do is to order indemnification to those who have suffered and to punish the guilty. (Doc. 102, p. 70.)

Not long, however, could this plaintive response suffice as an excuse for the outrages committed upon our citizens and their property, for, as we have seen by the decrees already cited (and there were many more), the assembly soon joined in the attack, authorized it, and rendered it governmental.

A single mistaken capture might be forgiven, provided proper compensation were made for injury to the citizen; but, when wholesale seizures were directed by the legislature and thereupon made by the executive, the matter assumed a much more serious and difficult aspect. To use the words of Mr. Sumner:

As intelligence of these spoliations reached the United States our whole commerce was fluttered. Merchants hesitated to expose ships and cargoes to such cruel hazards, and thereupon appeared the circular letter of the Secretary of State and the President's proclamation encouraging, by the promise of protection, those injured by the spoliators.

So ended the first phase of this controversy with a nation to whom we were bound by the strongest treaty ties, a nation engaged in war against an apparently overwhelming force and whose enemies used means of attack openly admitted to be contrary to the laws of civilized warfare; in alleged self-defense, it pursued an equally if not more indefensible course, which resulted in severe and unjustifiable loss to our citizens. That this system of seizures or spoliations was forbidden by every principle of civilized warfare was frankly admitted at the time, and later, England, which had pursued a similar course, made ample amends, and Spain which had countenanced the policy of France, and lent her ports in aid of it, did the same.

Nor were we altogether clear of blame. We had not complied, so far as appears, with the stipulations of the treaties of 1778, intended to provide for possible war; we had not protected the West India Islands, and not only had we refrained from acting as the ally of France, but, by the Jay treaty, we had given to her enemy the exclusive port privileges which she most valued, and which were secured to her by the treaty of amity and commerce.

It is not for us to criticise the patriotism and wisdom of the American statesmen of that day, the leading figures of our history, the men who bore the brunt of the fight which brought thirteen struggling colonies through a war with one of the mightiest and bravest nations of Europe to the successful issue which made possible the United States of today, with their thirty-eight States, eight Territories, and population of not far from sixty millions. Responsible for the welfare and future of a little republic of some two and a half millions of inhabitants, exhausted by seven years' warfare, and environed on

this continent by the three great monarchies of Europe; their country poor in finance, weak in population, and an object of jealousy and distrust to every sovereign, these eminent men dealt in a spirit of enlightened patriotism and high courage with the political questions presented to them, according to their best and well-trained judgment, in the light of the information they then had. We now, as a judicial body, treat the facts as they are presented in relation to private rights, and no judgment of ours can properly be held, as it has been argued it would be, to reflect in any manner upon the course pursued by the President, his advisers and subordinates, in the anxious period between 1789 and 1800. Upon their diplomatic foresight and ability no decision of ours can cast a shadow, and it must be clearly understood that we deal only with those private rights which may possibly have been invaded in the pursuit of a policy aiming at the life and prosperity of the nation.

The French complained of our course during the war then progressing, while we complained of spoliation and maltreatment of our vessels at sea, losses by the embargo at Bordeaux, non-payment of drafts drawn by the Colonial administration, seizures of cargoes of vessels, non-performance of contracts by Government agents, condemnation of vessels and their cargoes in violation of the treaties of 1778, and captures under the decree of 1793. (Foreign Relations, vol. 1, pp. 748 *et seq.*)

Pinckney was ordered out to replace Monroe under particular instructions to "look into" the claims of our citizens (*ibid.* 742), but before he arrived the decree of October 31, 1796, was made public, which prohibited the importation of manufactured articles, whether of English make or English commerce (6 Garden, 117), and Pinckney upon his arrival was not recognized or received, but ordered to leave France, as that Government would receive no minister from the United States "until after a reparation of the grievances demanded of the American Government, and which the French Republic had a right to expect." (Foreign Relations, vol. 1, p. 746.)

The strained relations between the two countries can not be better illustrated than by an extract from the speech of the president of the Directory made to Monroe, in the presence of the diplomatic corps, when the latter, on the 30th December, 1796, took his official leave. Upon that occasion the president said:

By presenting this day to the Executive Directory your letters of recall you offer a very strange spectacle to Europe. France, rich in her freedom, surrounded by the train of her victories, and strong in the esteem of her allies, will not stoop to calculate the consequences of the condescension of the American Government to the wishes of its ancient tyrants. The French Republic expects, however, that the successors of Columbus, Raleigh, and Penn, always proud of their liberty, will never forget that they owe it to France. They will weigh in their wisdom the magnanimous friendship of the French people with the crafty caresses of perfidious men who mediate to bring them again under their former yoke. Assure the good people of America, Mr. Minister, that, like them, we adore liberty; that they will always possess our esteem, and find in the French people that republican generosity which knows how to grant peace as well as to cause its sovereignty to be respected. (*Foreign Relations*, vol. 1, p. 747.)

This speech, as President Adams said, discloses sentiments

more alarming than the refusal of a minister, because more dangerous to our independence and union, and at the same time studiously marked with indignities towards the Government of the United States. It evinces a disposition to separate the people of the United States from the Government. . . . Such attempts ought to be repelled with a decision which shall convince France, and the world, that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest. (*Foreign Relations*, vol. 1, p. 40.)

The President added that, having no diplomatic representative in France, he had no means of obtaining official information, but believing that a decree had been passed contravening in part the commercial treaty of 1778, he laid a copy of that instrument before the Congress, stating that it was his "indispensable duty to recommend to [their] consideration effectual measures of defense." The Congress were, however, peacefully inclined, although before adjourning they passed the law providing passports for American vessels. (1 Stat. L. 489.)

Soon after the adjournment (June 22) Pinckney, Marshall, and Gerry were commissioned envoys to France for the purpose of endeavoring to renew relations with that country.

Jefferson, then Vice-President, immediately wrote Gerry:

That peace is undoubtedly at present the first object of our nation. Interest and honor are also national considerations. But interest, duly weighed, is in favor of peace, even at the expense of spoliations, past and future, and honor can not now be an object. The insults and injuries committed on us by both the belligerent parties from the beginning of 1793 to this day, and still continuing, can not be wiped off by engaging in war with one of them. Our countrymen have divided themselves by such strong affections to the French and the English that nothing will secure us internally but a divorce from both nations. (Jefferson's Works, vol. 4, p. 187.)

The tone and intent of the instructions to these envoys may be understood from one paragraph in Mr. Pickering's letter to them (Doc. 102, p. 464, July 15, 1797):

Finally, the great object of the Government being to do justice to France and her citizens, if in anything we have injured them. to obtain justice for the multiplied injuries they have committed against us, and to preserve peace, your style and manner of proceeding will be such as shall most directly tend to secure these objects.

The envoys had hardly reached Paris when another decree was aimed against our suffering merchants which prohibited every vessel that had entered an English port from being admitted into any port of the French Republic, and handed over to condemnation every vessel laden in whole or in part with merchandise coming out of England or her possessions. (Doc. 102, p. 483.) The American ministers protested, saying that the decree attacked the interests and independence of neutral powers; that it took from them the profits of an honest and lawful industry, as well as the inestimable privilege of conducting their own affairs as their judgment might direct, and added that acquiescence in it would establish a precedent for national degradation which would authorize any measures power might be disposed to practice. (*Ibid.* 483 *et seq.*)

France leaned to dictation, not negotiation. With Bonaparte successful in Italy and Talleyrand at the head of foreign affairs, she was in a far from conciliatory temper. The result was that, without ever being received officially, the envoys returned, not, however, before Talleyrand had, as a set-off to their demands, presented the counter-claims of France. (Foreign Relations, vol. 2, p. 190.)

During this mission occurred the notorious X. Y. Z. episode, when demands were made upon the ministers by individuals, veiled in the dispatches under these mysterious letters, for a large sum of money as a *douceur* to the Directory and an additional and much larger amount as a loan to France. Talleyrand later, and over his own signature, proposed a loan, omitting reference to the *douceur*, and in the same note complained of the Jay treaty as a principal grievance. The dispatches containing an account of the X. Y. Z. episode coming back from the United States in print, Gerry, the only envoy then remaining, left Paris on the 26th July, 1798. (*Treaties and Conventions*, etc., Bancroft Davis, 997, 998.)

The return of the mission created an effect at home very inimical to France; the President said he would never send another minister without assurances that he would be received, respected, and honored as "the representative of a great, free, powerful, and independent nation" (*Foreign Relations*, vol. 2, p. 199); but before this (June 21, 1798), Congress had passed the act "to more effectually protect the commerce and coasts of the United States" (May 28, 1798, 1 Stat. L. 561), the act suspending commercial relations with France (June 13, 1798), and various other laws of similar import, which will be considered hereafter in connection with another branch of this case.

Washington was put in command of the army as lieutenant-general and commander-in-chief, and in accepting said (5 *Annals of Cong.*, 622):

The conduct of the Directory of France towards our country; their insidious hostility to its Government; their various practices to withdraw the affections of the people from it; the evident tendency of their acts and those of their agents to countenance and invigorate opposition; their disregard of solemn treaties and the law of nations; their war upon our defenseless commerce; their treatment of our ministers of peace; and their demands, amounting to tribute, could not fail to excite in me corresponding sentiments with those my countrymen have so generally expressed.

This state of affairs could not long continue. Talleyrand, appreciating the dangers of the situation, soon opened indirect communication with the United States, and on the 28th September, said that our plenipotentiary if sent would be "received with the respect due to the representative of a free, independent, and powerful nation." (*Foreign*

Relations, vol. 2, p. 242.) This was an exact compliance with the President's condition precedent, and thereupon Oliver Ellsworth, Chief Justice of the United States, William R. Davie, late governor of North Carolina (Patrick Henry declining to serve), and William Vans Murray, minister resident at The Hague, were commissioned envoys extraordinary and ministers plenipotentiary "to discuss and settle by a treaty all controversies between the United States and France." (*Ibid.* 243.) This mission, appointed in March, 1799, closed its labors by the treaty signed September 30, 1800.

Arriving in France they found the Directory no longer in existence, but treated with Napoleon, then become First Consul. Ministers were appointed to meet them, and the 7th April, 1800, powers were exchanged and negotiations began. (Doc. 102, p. 579.)

The Americans were instructed to inform the French ministers at the opening that we expected, "as an indispensable condition of the treaty," a stipulation to make to our citizens "full compensation for all losses and damage which they shall have sustained by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from the French Republic or its agents." Other points were urged upon them, but for the purpose of this case it is necessary only to note that they were to obtain a claims commission, to refuse recognition of the treaties of 1778, to refuse a guaranty, to refuse any aid or loan, and to make no engagement contrary to the Jay treaty. (Foreign Relations, vol. 2, p. 306.)

The Secretary of State said, in his instructions:

Instead of relief, instead of justice, instead of indemnity for past wrongs, our very moderate demands have been immediately followed by new aggressions and more extended depredations, while our ministers, seeking redress and reconciliation, have been refused a reception, treated with indignities, and finally driven from its territories. This conduct . . . would well have justified an immediate declaration of war, but . . . the United States contented themselves with preparations for defense, and measures calculated to protect their commerce.

At the close of his instructions the Secretary sets out certain points to be considered as ultimata, of which the following only is now important:

1. That there be established a board to determine the claims of our citizens, which France should bind herself to pay.

Having carried the history of the claims down to this point let us look back upon it and see what rights we had at that time as against France, laying aside for the moment certain defenses set up by the defendants, such as the existence of war and the abrogation of the old treaties. Apart from these points, which have been urged upon us with great ability by the learned counsel for the Government, were the claims at the opening of the negotiations in 1800 valid international obligations against France?

That nation had seized upon the high seas neutral vessels laden with neutral cargo. In the case at bar, for example, the American schooner *Sally*, owned by citizens of the United States, commanded by a citizen of the United States, duly registered under the laws of the United States, bound from Massachusetts to Spain, laden with cargo belonging to American citizens, was seized upon the high seas, taken into a French port, condemned and confiscated for the benefit of the privateer which seized her; and all this, not upon the ground that she had violated the law of nations, but because she had violated the French regulations "concerning the navigation of neutrals." It seems hardly necessary to discuss the proposition that such a proceeding was unwarranted; the French themselves admitted it in their decrees and correspondence; the Russian Czar, in ordering his admiral to pursue a similar course, said it was not "strictly conformable to the natural laws of war." England paid for damages thus committed, as did Spain, which had countenanced the acts of French consuls in condemning American vessels brought into Spanish ports. (Treaty of 1819.)

Senator Livingston, in the Twenty-first Congress, first session, said, in the report made by him:

The committee does not recollect that the justice of the claims has ever been denied. . . . To deny [it] would be assertion of a right on the part of France to indiscriminate plunder of neutral property. . . . But the justice of the claims was not denied, and the necessity of providing indemnity was expressly acknowledged.

This is true as a matter of pure international law; how much more true is it in the face of a treaty which guaranteed the protection to

our vessels (Art. 6) of French ships of war; which made free ships free goods (Art. 23); which prohibited opening hatches or disturbing packages when the vessel had a passport (Arts. 12 and 13); which directed the commanders of French ships to do no "injury or damage" to vessels of the United States (Art. 15); and which contained other provisions insuring an exceptional amount of protection to our commerce and guardianship of our commercial rights?

Mr. Jefferson thought this class of claims valid when he issued his circular of August, 1793, assuring the mercantile community that due attention would be paid to these injuries and proper proceedings adopted for their relief. The President thought them valid when, later in the same year, he wrote to Congress that due measures would be taken to "obtain redress of the past and more effective provisions against the future." Pickering thought them valid when he made their settlement an ultimatum, and the French Government thought them worthy of consideration when they proposed a commission to decide upon them coupled with the counter proposition that the United States indemnify American creditors then existing, or to be created through the agency of this commission, by way of a loan to France, which that country was to be pledged to repay. (Doc. 102, p. 467.)

The defendants contend that the seizures were justified, as war existed between this country and France during the period in question; and, as we could have no claim against France for seizure of private property in time of war, the claimants could have no resulting claim against their own Government; that is, the claims, being invalid, could not form a subject of set-off as it is urged these claims did in the second article of the treaty of 1800. It therefore becomes of great importance to determine whether there was a state of war between the two countries.

It is urged that the political and judicial departments of each Government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each Government from the other and "held for exchange, punishment, or retaliation, according to the laws and usages of war." While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be incon-

sistent with a state of reprisals straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after the conclusion of which the parties must, as between themselves, begin international life anew.

The French issued decree after decree against our peaceful commerce, but on the ground of military necessity incident to the war with Great Britain and her allies; they refused to receive our minister, but in that refusal, insolent though it was, there is nothing to show that war was intended, and the mere refusal to receive a minister does not in itself constitute a ground for hostilities.

The Attorney-General, Mr. Lee, in August, 1798, very strongly sustained the defendants' position, for he wrote the Secretary of State that there existed with France "not only an actual maritime war," but "a maritime war authorized by both nations;" that consequently France was an enemy, to aid and assist whom would be treason on the part of a citizen of the United States; but we can not agree that this extreme position was authorized by the facts or the law.

Congress enacted the various statutes hereinafter referred to in detail, and when one of them, the act providing an additional armament, was passed in the House, Edward Livingston, who opposed it, said:

Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case.

Those were times of great excitement; between danger of international contest and the heat of internal partisan conflict statesmen could not look at the situation with the calmness possessed by their successors, and those successors, with some exceptions to be sure, regarded the relations between the countries as not amounting to war.

The question has been carefully examined by authorized and competent officers of the political department of the Government, and we may turn to their statements as expository of the views of that branch upon the subject.

In 1827 Senator Holmes reported that there had been "a partial war," but no "such actual open war as would absolve us from treaty stipulations. . . . It was never understood here that this was such a war as would annul a treaty." (19th Cong., 2d sess., Senate Rep., Feb. 8, 1827, p. 8.)

Mr. Giles, reporting to the House of Representatives as early as 1802, called it a "partial state of hostility" between the United States and France.

Mr. Chambers reported to the Senate in 1828 that—

The relations which existed between the two nations in the interval between the passage of the several acts of Congress before referred to and the convention of 1800 were very peculiar, but in the opinion of your committee can not be considered as placing the two nations in the attitude of a war which would destroy the obligations of previously existing treaties.

Mr. Livingston reported to the Senate in 1830 that—

This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences. . . . Nowhere is the slightest expression on either side that a state of war existed, which would exonerate either party from the obligations of making those indemnities to the other. . . . The convention which was the result of these negotiations is not only in its form different from a treaty of peace, but it contains stipulations which would be disgraceful to our country on the supposition that it terminated a state of war. . . . Neither party considered then they were in a state of war. (Rep. 4, p. 445.)

Mr. Everett made a statement in the House of Representatives on the 21st February, 1835, in which he said:

The extreme violence of the measures of the French Government and the accumulated injuries heaped upon our citizens would have amply justified the Government of the United States in a recourse to war; but peaceful remedies and measures of defense were preferred; [and, after referring to the acts of Congress, he adds:] These vigorous acts of defense and preparation, evincing that, if necessary, the United States were determined to proceed still further and go to war for the protection of their citizens, had the happy effect of precluding a resort to that extreme measure of redress.

Finally, Mr. Sumner considered the acts of Congress as "vigorous measures," putting the country "in an attitude of defense;" and that the "painful condition of things, though naturally causing great

anxiety, did not constitute war." (38th Cong., 1st sess., Rep. 41, 1864.)

The judiciary also had occasion to consider the situation, and the learned counsel for defendants cites us to the opinion of Mr. Justice Moore delivered in the case of *Bas v. Tingy* (4 Dall. 37), wherein the facts were as follows: Tingy, commander of the public armed ship the *Ganges*, had libelled the American ship *Eliza*, Bas, master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799 and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. Each of the four justices present delivered an opinion.

Justice Moore, answering the contention that the word "enemy" could not be applied to the French, says:

How can the characters of the parties engaged in hostility or war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, they should be called enemies; for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.

Justice Washington considers the very point now in dispute, saying (p. 40):

The decision of this question must depend upon . . . whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective Governments, is not only war, but public war. If it be declared in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under

special authority and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war where the Government retains the general power.

Applying this rule he held that "an American and French armed vessel, combating on the high seas, were enemies," but added that France was not styled "an enemy" in the statutes, because "the degree of hostility meant to be carried on was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by Congress might have constituted a perfect state of war which was not intended by the Government."

Justice Chase, who had tried the case below, said:

It is a limited, partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land, to capture unarmed French vessels, nor even to capture French armed vessels in a French port, and the authority is not given indiscriminately to every citizen of America against every citizen of France, but only to citizens appointed by commissions or exposed to immediate outrage and violence. . . . If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was . . . only a partial enemy.

Justice Paterson concurred, holding that the United States and France were "in a qualified state of hostility"—war "*quoad hoc*." As far as Congress tolerated and authorized it, so far might we proceed in hostile operations and the word "enemy" proceeds the full length of this qualified war, and no further.

The Supreme Court, therefore, held the state of affairs now under discussion to constitute partial warfare, limited by the acts of Congress.

The instructions to Ellsworth, Davie, and Murray, dated October 22, 1799, did not recognize a state of war as existing, or as having existed, for they said the conduct of France would have justified an immediate declaration of war, but the United States, desirous of maintaining peace, contented themselves "with preparations for defense and measures calculated to defend their commerce." (Doc. 102, p.

561.) Yet all the measures relied upon as evidence of existing war had taken effect prior to the date of these instructions. So the ministers, in a communication to the French authorities, said, as to the acts of Congress, "which the hard alternative of abandoning their commerce to ruin imposed," that "far from contemplating a cooperation with the enemies of the Republic [they] did not even authorize reprisals upon her merchantmen, but were restricted simply to the giving of safety to their own, till a moment should arrive when their sufferings could be heard and redressed." (Doc. 102, p. 583.)

France did not consider that war existed, for her minister said that the suspensions of his functions was not to be regarded as a rupture between the countries, "but as a mark of just discontent" (15 Nov., 1796, Foreign Relations, vol. 1, p. 583), while J. Bonaparte and his colleagues termed it a "transient misunderstanding" (Doc. 102, p. 590), a state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective 'Governments,' " and which had not been a state of war, at least on the side of France. (*Ibid.* 616.)

The opinion of Congress at the time is best gleaned from the laws which it passed. The important statute in this connection is that of May 28, 1798 (1 Stat. L. 561) entitled "An act more effectually to protect the commerce and coasts of the United States." Certainly there was nothing aggressive or warlike in this title.

The act recites that, whereas French armed vessels have committed depredations on American commerce in violation of the law of nations and treaties between the United States and France, the President is authorized—not to declare war, but to direct naval commanders to bring into our ports, to be proceeded against according to the law of nations, any such vessels "which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations on the vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel."

This law contains no declaration or threat of war; it is distinctly an act to protect our coasts and commerce. It says that our vessels may arrest a vessel raiding or intending to raid upon that commerce, and that such vessel shall not be either held by executive authority or confiscated, but turned over to the admiralty courts—recognized inter-

national tribunals—for trial, not according to municipal statutes, as was being done in France, but according to the law of nations. Such a statute hardly seems necessary, for if it extended at all the police powers of naval commanders upon the high seas it was in the very slightest degree, and it is highly improbable that then or now, with or without specific statutory or other authority, an American naval commander would in fact allow a vessel rightfully flying the flag of the United States to be seized on the high seas or near our coasts by the cruiser of another Government. But if the act did enlarge the power of such officers, and give to them authority not theretofore possessed, it tied them down to specified action in regard to specified vessels

They might seize armed vessels only, and only those armed vessels which had already committed depredations, or those which were on our coast for the purpose of committing depredations, and they might retake an American vessel captured by such an armed vessel. This statute is a fair illustration of the class of laws enacted at this time; they directed suspension of commercial relations until the end of the next session of Congress, not indefinitely (June 13, 1798, *ibid.*, § 4, p. 566); they gave power to the President to apprehend the subjects of hostile nations whenever he should make "public proclamation" of war (July 6, 1798, *ibid.* 577), and no such proclamation was made; they gave him authority to instruct our armed vessels to seize French "armed," not merchant, vessels (July 9, 1798, *ibid.* 578), together with contingent authority to augment the army in case war should break out or in case of imminent danger of invasion. (March 2, 1799, *ibid.* 725.) Within a few months after this last act of Congress the Ellsworth mission was on its way to France to begin the negotiations which resulted in the treaty of 1800 and even the act abrogating the treaties of 1778 does not speak of war as existing, but of "the system of predatory violence . . . hostile to the rights of a free and independent nation." (July 7, 1798, *ibid.* 578.)

If war existed why authorize our armed vessels to seize French armed vessels? War itself gave that right, as well as the right to seize merchantmen, which the statutes did not permit. If war existed why empower the President to apprehend foreign enemies? War itself placed that duty upon him as a necessary and inherent incident of military command. Why, if there was war, should a suspension of commercial intercourse be authorized, for what more complete suspension of that intercourse could there be than the very fact of war?

And why, if war did exist, should the President, so late as March, 1799, be empowered to increase the army upon one of two conditions, viz., that war should break out or invasion be imminent, that is, if war should break out in the future or invasion become imminent in the future?

Upon these acts of Congress alone it seems difficult to found a state of war up to March, 1799, while in February, 1800, we find a statute suspending enlistments, unless, during the recess of Congress, "war should break out with France." This is proof positive that Congress did not then consider war as existing, and in fact Ellsworth, Davie, and Murray were at the time hard at work in Paris. In May following the President was instructed to suspend action under the act providing for military organization, although the treaty was not concluded until the following September.

This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war did not in fact exist.

Wheaton draws a distinction between two classes of war, saying:

A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things [to which the editor adds:] Such were the limited hostilities authorized by the United States against France in 1798. (Lawrence's Wheaton, 518.)

There was no declaration of war; the tribunals of each country were open to the other—an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended; but during many years there was no intercourse between England and Mexico, which were not at war; there was retaliation and reprisal, but such retaliations and reprisals have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of the one became the enemy of every citizen of the other; finally, there was not that kind of war which abrogated treaties and wiped out, at least temporarily, all pending rights and contracts, individual and national.

In cases like this "the judicial is bound to follow the action of the political department of the Government, and is concluded by it" (*Phillips v. Payne*, 92 U. S. 130); and we do not find an act of Congress or of the Executive between the years 1793 and 1801 which recognizes an existing state of solemn war, although we find statutory provisions authorizing a certain course "in the event of a declaration of war," or "whenever there shall be a declared war," or during the existing "differences." One act provides for an increase of the army "in case war shall break out," while another restrains this increase "unless war shall break out." (1 Stat. L. 558, 577, 725, 750; see also acts of Feb. 10, 1800, and May 14, 1800.)

We have already referred to the instructions of the Executive, which show that branch of the Government in thorough accord with the legislative on this subject, and the negotiations of our representatives hereinafter referred to were marked by the same views, while the treaty itself—a treaty of amity and commerce of limited duration—is strong proof that what were called "differences" did not amount to war. We are, therefore, of opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war in its nature similar to a prolonged series of reprisals.

The general effect and purpose of the treaty of 1800 can be clearly gleaned from the negotiations preceding its signature, which will next be considered.

The treaties of 1778 provided that French men-of-war should protect our vessels and citizens (Treaty of Commerce, Art. 6); that our merchantmen having passports and certificates showing their cargoes not to be contraband should not have their hatches opened, their packages disturbed, or the "smallest parcels of goods" removed (Arts. 12 and 13); that a French man-of-war meeting an American merchantman should remain out of cannon-shot, and send on board not more than three men, when, should the merchantman have a passport, he might proceed (Art. 27); freedom of trade was secured and contraband defined.

Soon after the French revolution the series of attacks upon our commerce began, at first veiled under the excuse of mistake, then of a necessary self-defense, coupled with promise of compensation, and

finally open and undisguised. First it was said that the seizures were accidental, as the two English-speaking nations could not be distinguished by the French sailors; soon after all neutral vessels laden with provisions and bound to an enemy's port were ordered seized as a war measure, but compensation was promised; and it was then that the President and Secretary of State, having already issued the proclamation of neutrality, which greatly incensed France, voluntarily promised protection and redress to citizens of the United States thus injured by our former ally. At this point, therefore, we have on both sides an admission of the validity of claims arising from the spoliations--the President, in the proclamation and circular letter, the French, in their decrees, as well as in a letter to the Secretary of State (March 27, 1794), in which the French minister wrote that "If any of your merchants have suffered any injury by the conduct of our privateers . . . they may with confidence address themselves to the French Government." (Doc. 102, p. 264.) Nearly four months later the French commissioner of foreign relations informed our minister that there should not be a doubt of the disposition of the convention and Government to "make good the losses which circumstances inseparable from a great revolution may have caused some American navigators to experience." (July 5, 1794; *ibid.* 77.) Then came Genet's dismissal; Jay was sent to England, and Monroe, succeeding Morris, seemed to have progressed so successfully that Washington announced to Congress (Feb. 20, 1795), "that these claims are in a train of being discussed with candor, and amicably adjusted." (Wait's American State Papers, vol. 3, p. 402.)

The Jay treaty entirely changed the situation; France violently remonstrated, treated Monroe with insult, refused to receive Pinckney, threw off the last restraints upon its cruisers and privateers, and its colonial agents joined with so much vigor in the illegal attack upon a peaceful neutral commerce, that "American vessels no longer entered the French ports unless carried in by force." (Doc. 102, pp. 434, 435.)

Just complaint was not, however, confined to one side, for we had failed in performance of obligations imposed upon us by the treaties of 1778. We had undertaken a guaranty of French possessions in America, and pledged ourselves that "in case of a rupture between France and England the reciprocal guaranty . . . shall have its full force and effect the moment such war shall break out." (Art. 12,

Treaty of Alliance.) This guaranty was to endure "forever." It was contended by us that the *casus fœderis* could never occur except in a defensive war. As Secretary Pickering said:

The nature of this obligation is understood to be that when a war really and truly defensive exists the engaging nation is bound to furnish an effectual and adequate defense, in cooperation with the power attacked. (Doc. 102, p. 457, *Pickering to Pinckney et al.*, July 15, 1797.)

Whether the treaty so limited the obligation, or whether France in her struggle with the allied powers was waging a defensive war, is not now important. France certainly believed herself entitled to demand our aid, and understood the *casus fœderis* to have occurred.

At the opening of the war France possessed the fertile islands of St. Domingo, Martinique, Guadeloupe, St. Lucia, St. Vincent, Tobago, Deseada, Mariegalante, St. Pierre, Miquelon, and Grenada, with a colony on the mainland at Cayenne, and "in little more than a month the French were entirely dispossessed of their West India possessions, with hardly any loss to the victorious nation." (*Alison's History*, vol. 3, p. 396.)

The French colonists urged us to intervene, but the French Government thought it wiser for us not then to embark in the war, as it might diminish their supplies from America; they would, however, they said, leave us to act according to our wishes, looking to us meantime for financial aid. (*Foreign Relations*, vol. 1, p. 688.) This was not a renunciation of the guaranty, nor was it so regarded here.

A study of the correspondence shows that these provisions of the two treaties, especially the guaranty, constantly hampered our ministers, and Jefferson said he had no doubt "we should interpose at the proper time" (*Jefferson's Works*, vol. 4, p. 102), while the French Government dwelt upon the "inexecution of the treaties" (*Foreign Relations*, vol. 1, p. 658), said "they had much cause of complaint against us" (*ibid.* 731), and finally refused to receive Pinckney "until after a reparation of grievances," while their minister here demanded "in the name of American honor, in the name of the faith of the treaties, the execution of that contract which assured to the United States their existence and which France regarded as the pledge of the most sacred union between two people the freest upon earth." (*Foreign Affairs*, vol. 1, pp. 579 *et seq.*)

The claims of France, national in their nature, were thus set up again against the claims of the United States, individual in their inception, but made national by their presentation through the diplomatic department of the Government.

It is not for us to say whether the claims of France had any validity in international law, because for the purpose of this case it need only be observed that they were urged in diplomacy with every apparent belief that the French position was tenable. Whether valid or not they were an efficient arm of defense against our contentions, and were so used with ability, skill, and success. In fact there is a recognition of apparent justness in these demands found in the instructions to the Pinckney mission, who were directed while urging our claims to propose a substitute for the mutual guaranty "or some modification of it," as "instead of troops or ships of war" "to stipulate for a moderate sum of money or quantity of provisions," to be delivered in any future defensive war "not exceeding \$200,000 a year during any such war" (*Foreign Relations*, vol. 2, p. 155), and Talleyrand, on the other side, told Mr. Gerry (June 15) that the Republic desired to be restored to the rights which the treaties conferred upon it, and through these means to assure the rights of the United States. "You claim indemnities," he said; we "equally demand them, and this disposition being as sincere on the part of the United States as it is on its [the Republic], will speedily remove all the difficulties." (Doc. 102, p. 529.)

Such was the situation when the Ellsworth mission arrived in France.

The instructions to this legation directed them as an "indispensable condition" to obtain full compensation for all losses and damages sustained by citizens of the United States from irregular or illegal captures or condemnations.

The French representatives did not dispute the validity of the claims, but stood upon the treaties of 1778. To their opening propositions the American envoys received a courteous response, which, however, put a new phase upon the negotiation, and placed them in a most embarrassing position. Bonaparte and his colleagues said in substance (6 May, 1800, Doc. 102, p. 590): The discharge of damages between the two nations resulting from the "transient misunderstanding" can be "considered only as a consequence of the interpretation" given by mutual consent to the treaties. They agreed "upon the expediency of compensation," and suggested that the discussion had become confined to two points, the principles which ought to govern the political

and commercial relations of the two countries and the most suitable form for liquidating and discharging the indemnities due. The examination of principles should come first in order, they said, for "indemnification can only result from an avowed violation of an acknowledged obligation," and an "agreement upon principles can alone assure peace and maintain friendship." The French ministers then, alluding to the treaties, referred to the second article of the draft submitted by the Americans, which provided that the commission suggested should decide claims "conformably to justice and the law of nations, and in all cases of complaint prior to the 7th of July, 1798, they should pronounce agreeably to the treaties and consular convention then existing between France and the United States." Now this second article of the draft applied only to claims of citizens of each country, while July 7, 1798, was the date of the act of Congress annulling the treaties; but the French ministers ignoring this said that they saw no reasons for the distinction, as the treaties and convention are "the only foundations of the negotiations;" that from them arose the misunderstanding, and upon them "union and friendship should be established"; and they thus significantly concluded: "When the undersigned hastened to acknowledge the principle of compensation, it was in order to give an unequivocal evidence of the fidelity of the French Government to its ancient engagements, every pecuniary stipulation appearing to it expedient as a consequence of ancient treaties, and not as the preliminary of a new one." So the French were planted squarely on the treaties which the Americans were forbidden to consider as existing after July, 1798. Two days later our ministers explained their position (*ibid.* 592), and nine days later wrote to the Secretary of State (*ibid.* 607) that their success was still doubtful, as the "French think it hard to indemnify for violating engagements unless they can thereby be restored to the benefits of them." Soon followed a conference between the plenipotentiaries, when the negotiations were brought to a halt, as no further progress could be had until other "powers" or "instructions" for the two words seem to have been used synonymously, were received from the First Consul.

The French ministers had frequently mentioned the insuperable repugnance of their Government to surrender the claim to priority assured to it in the "commercial treaty of 1778," urging:

The equivalent alleged to be accorded by France for this stipulation, the meritorious ground on which they generally represented

the treaty stood, denying strenuously the power of the American Government to annul the treaties by a simple legislative act; and always concluding that it was perfectly incompatible with the honor and dignity of France to assent to the extinction of a right in favor of an enemy, and as much so to appear to acquiesce in the establishment of that right in favor of Great Britain. The priority with respect to the right of asylum for privateers and prizes was the only point in the old treaty on which they had anxiously insisted, and which they agreed could not be as well provided for by a new stipulation. (Doc. 102, p. 608.)

The American envoys (July 23, 1800), in answer to the French arguments, reducing to writing the substance of two conferences, said (Doc. 102, p. 612):

As to the proposition of placing France with respect to an asylum for privateers and prizes, upon the footing of equality with Great Britain, it was remarked that the right which had accrued to Great Britain in that respect was that of an asylum for her own privateers and prizes, to the exclusion of her enemies, wherefore it was physically impossible that her enemies should at the same time have a similar right. With regard to the observation that by the terms of the British treaty the rights of France were reserved, and therefore the rights of Great Britain existed with such limitation as would admit of both nations being placed on a footing which should be equal, it was observed by the envoys of the United States that the saving in the British treaty was only of the rights of France resulting from her then existing treaty, and that that treaty having ceased to exist, the saving necessarily ceased also, and the rights which before that event were only contingent immediately attached and became operative.

Admission of the continuing force of the old treaties might involve admission of France's national claims, and in any event would put her ministers into a most advantageous position, giving them as consideration, to be surrendered at their pleasure in the new negotiation, what would then be a vested, existing, and acknowledged right to the guarantee, the alliance, and the use of our ports. Placed in this position, France would be without incentive to action; she would start in the discussion of a new treaty with more surrendered to her at the outset than she had hoped to obtain at the conclusion, and all that she afterward gave up would be by way of generous concession. What-

ever the law, whether the treaties were or were not abrogated by the act of Congress or the acts of parties, the American envoys were not permitted to admit the French contention, but were in duty bound to argue that the treaties were without continuing force. They followed this course, saying:

A treaty being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the other to renounce and declare the same to be no longer obligatory. . . . The remaining party must decide whether there had been such violation on the other part as to justify its renunciation. For a wrong decision it would doubtless be responsible to the injured party, and might give cause for war; but even in such case, its act of public renunciation being an act within its competence would not be a void but a valid act, and other nations whose rights might thereby be beneficially affected would so regard it. (Doc. 102, p. 612.)

After further argument, they added that as it was the opinion of the French ministers that "it did not comport with the honor of France" to admit the American contentions, and at the same time be called upon for compensation, they offered "as their last effort" a proposition which suspended payment of compensation for spoliations "until France could be put into complete possession of the privileges she contended for, and at the same time they offered to give that security which a great pecuniary pledge would amount to for her having the privilege as soon as it could be given with good faith, which might perhaps be in a little more than two years; at any rate within seven." (*Ibid.* 613.)

The French answered (Doc. 102, p. 615) that they still found no reason to consider the treaties of 1778 as broken; the act of 1798, being that of one party, could not destroy, they said, "otherwise than by war and victory," that which was the engagement of two. After some further argument they wrote that they would not push further their observations, as—

Those which they have repeated suffice to establish the rights of France, and to her the honor of a sacrifice which she would make in renouncing the exclusive right of entry into the ports of America for French privateers accompanied with their prizes. (*Ibid.* 615.)

As to the proposal of a money indemnity for delay they said:

The proposition of the American ministers offers to the Republic at a distant time the hope of exclusive advantages, and for the present, and, perhaps, for seven years, an humiliating forfeiture of those rights, and a shameful inferiority with regard to a state [Great Britain] over which she had acquired these privileges by the services she had rendered to America when it made war with such state. When the ministers of France can subscribe to a condition unworthy the French nation, the price which they would put upon their humiliation would it not be the continuance of a subjection, which they consider to be contrary to the interest of the United States? The dependence of her ally can not be for her an indemnity for a national suffering. The French ministers believing it to be their duty to insist with their Government upon the immediate renunciation of a privilege well acquired, it would be contradictory that they should provide for its return at a distant time. (*Ibid.* 615, 616.)

Some two weeks later the French again insisted that the treaties were not broken by the state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective Governments," and which had not been a state of war, at least on the side of France. (*Ibid.* 616.) Yet, after this opening, the ministers use language in apparent antagonism with the position thus and before advanced that the treaties were still existent; their tone toward the United States is marked by extreme bitterness, but they finish by consenting to an abolition of the treaties and the conclusion of a new one. The alternative proposition is thus put:

Either the ancient treaties, with the privileges resulting from priority and the stipulation of reciprocal indemnities, or a new treaty, assuring equality without indemnity. (*Ibid.* 618.)

To the first of these proposals our ministers were forbidden to assent, as it involved an admission of the continuing force of the treaties; to the second they could not assent, for their first duty was to obtain indemnity. The time had come when they must go beyond their instructions and assume personal responsibility. (Doc. 102, pp. 619, 620.)

In August, after some delay and apparent friction, the Americans, saying that "while nothing would be more grateful to America than

to acquit herself of any just claims of France, nothing could be more vain than an attempt to discourse to her reasons for the rejection of her own," made the following propositions (*ibid.* 623-625):

(1) Let it be declared that the former treaties are renewed and confirmed and shall have the same effect as if no misunderstanding between the two powers had intervened, except so far as they are derogated from by the present treaty.

(2) It shall be optional with either party to pay to the other within seven years 3,000,000 of francs in money or securities which may be issued for indemnities, and thereby to reduce the rights of the other as to privateers and prizes to those of the most favored nation. And during the said term allowed for option the right of both parties shall be limited by the line of the most favored nation.

The third proposition looked to such modification of the mutual guaranty that military stores should be furnished by the one party to the value of 1,000,000 francs to the other when attacked, but either might within the seven years pay the lump sum of 5,000,000 francs to be freed from the obligation. The fifth proposition provided indemnities for individuals, and that "public ships taken on either side [should] be restored or paid for," and the sixth that all property seized by either party and not yet "definitively condemned" should be restored on reasonable proof of it belonging to the other. So they finally agreed to recognize the existence of the treaties, the right of France to the guaranty and exclusive port privileges, and proposed to pay a lump sum to be free of their obligation in the future, for the propositions on this subject, while on their face mutual, were in effect for the benefit of the United States alone, France much preferring to revert to the *statu quo*.

Later during the negotiations an offer was made by us "to extinguish by an equivalent of 8,000,000 francs certain claims of France under the former treaties" (*ibid.* 626, 629); but even after all these concessions there was still no satisfactory promise of a result, although the existence of the treaties had in effect been recognized and "indemnity on either side in substance agreed to." The French now made a counter proposition continuing "the ancient treaties" "as if no misunderstanding had occurred," providing commissioners "to liquidate the respective losses," amending the article as to the use of ports by privateers, which was naturally a capital subject of differ-

ence, and providing that if after seven years the seventeenth and twenty-second articles of the treaty of commerce were not reestablished no indemnities should be paid, and, further, that the guaranty be converted into a "grant of succor for two millions" redeemable by a capital sum of ten millions. (*Ibid.* 627, 628.)

The Americans made a counter proposal, renewing their offer of 8,000,000 francs to be paid within seven years in consideration that the United States "be forever exonerated of the obligation, on their part, to furnish succor or aid under the mutual guaranty," and that the rights of the French Republic be forever limited to those of the most favored nation. (*Ibid.* 629.) To this the French tersely answered (*ibid.* 630):

We shall have the right to take our prizes into your ports; a commission shall regulate the indemnities owed by either nation to the citizens of the other; the indemnities which shall be due by France to the citizens of the United States shall be paid for by the United States; in return for which France yields the exclusive privileges resulting from the seventeenth and twenty-second articles of the treaty of commerce and "from the rights of the guaranty of the eleventh article of the treaty of alliance."

Matters now again reached a halting point; neither side would yield; France acknowledged her real object to be to avoid payment of indemnity, while the United States, on the other hand, could not assent to her views as to the guaranty and use of ports. In considerable heat the ministers parted. (*Ibid.* 632, 633.) The next day the Americans made another effort, because, as they wrote in their journal (*ibid.* 634), "being now convinced that the door was perfectly closed against all hope of obtaining indemnities with any modifications of the treaty, it only remained to be determined whether, under all circumstances, it would not be expedient to attempt a temporary arrangement which would extricate the United States from the war or that peculiar state of hostility in which they are at present involved, save the immense property of our citizens, now pending before the council of prizes, and secure, as far as possible, our commerce against the abuses of capture during the present war;" therefore they proposed (*ibid.* 635) that as to the treaties and indemnities, the question should be left open; that intercourse should be free; then, with suggestions as to property captured and not definitively condemned and property

which might thereafter be captured, they asked an early interview.

The French still insisted that a stipulation of indemnities involved an admission of the force of the treaties (*ibid.* 635-637), and after argument proposed that the discussion of the indemnities, together with the discussion of article 11 of the treaty of alliance and articles 17 and 22 of the treaty of commerce, be postponed, but with the admission that the two treaties are "acknowledged and confirmed . . . as well as the consular convention of 1788;" that national ships and privateers be treated as those of the most favored nation; that national ships be restored and paid for, and that the "property of individuals not yet tried shall be so according to the treaty of amity and commerce of 1778, in consequence of which a *rôle d'équipage* shall not be exacted, nor any other proof which this treaty could not exact." So, after months of negotiation, the French ministers come back flat-footed upon the treaties as still existing, something which our representatives were forbidden by their instructions to admit. Nevertheless this proposal formed the text for discussion, and upon so slight a foundation was built the treaty of 1800.

After prolonged negotiation, and after striking out the word "provisional" in the name or description of the new treaty, the American commissioners signed it, although with great reluctance, "because they were profoundly convinced that, considering the relations of the two countries politically, the nature of our demands, the state of France, and the state of things in Europe, it was [their] duty, and for the honor and interest of the Government and people of the United States, that [they] should agree to the treaty rather than make none." (*Ibid.* 640.)

The vital effect of this negotiation as explanatory of the treaty of 1800, upon which the rights of these claimants are founded, explains the rehearsal of its details during which the so-called ultimatum of our Government was abandoned and the contention of the French Government as to the existence of the treaties was admitted.

Starting under their instructions, events had forced the ministers to offer unlimited recognition of the treaties of 1778, coupled with a pecuniary equivalent to extinguish in the future their most onerous provisions (*ibid.* 643); even this was not accepted, and the French, returning to their original ground, said that no indemnity could be granted unless the treaties were recognized without qualification as to the future, and this, they said, with the avowed object of avoiding

the payment of indemnity. (*Ibid.*) The American ministers had then but two courses open to them, either to quit France, leaving the United States involved in a dangerous contest, or to propose a temporary arrangement, reserving for later adjustment points which could not then be satisfactorily settled. (*Ibid.* 644.) They elected the latter course, and the treaty signed at Paris the 30th day of September, 1800, by Ellsworth, Davie, and Murray, on the one hand, and J. Bonaparte, Fleurieu, and Roederer, on the other, became part of the supreme law of the land, and was so proclaimed by the President the 21st day of December, 1801.

But between its signature and proclamation a very important history intervened, one extremely interesting to the claimants at this bar, and which has been the cause of much argument and contention.

The compromise by our ministers, to which they were forced by the position of the French Government, was contained in the second article, which read:

The ministers plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of the 14th of November, 1788, nor upon the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and conventions shall have no operation, and the relations of the two countries shall be regulated as follows.

It is apparent that this article makes the treaty temporary and provisional in its nature; it admits that the existence or non-existence of the treaties of 1778, with the liabilities thereby imposed, is open to discussion, and that the indemnities are not provided for; that is, that the very first of the so-called "ultimata" of Secretary Pickering is temporarily abandoned. The Senate advised and consented to the ratification of the treaty provided this article be expunged, and in its place the following article be inserted:

It is agreed that the present convention shall be in force for the term of eight years from the time of exchange of ratifications.

Napoleon thereupon consented (July 31, 1801), "to accept, ratify, and confirm" the convention, with an addition importing that it shall

be in force for the space of eight years, and with the retrenchment of the second article:

Provided, That by this retrenchment the two states renounce the respective pretensions which are the object of the said article.

The ratifications were exchanged in Paris, July 31, 1801. The treaty, with its addenda, was again submitted to the Senate, and in that form received the approval of that body (December 19, 1801), when it declared that it considered the convention "fully ratified," and returned it to the President for promulgation.

What the respective pretensions were which were the subject of the second article does not admit of a shadow of doubt: on the one hand, the alleged continuing existence of the treaties incidentally involving national claims for past acts on our part and more particularly a right to future privileges; on the other hand, indemnity to our citizens for spoliation.

Our claims were good by the law of nations, and we had no need to turn back to the treaties for a foundation upon which to rest our arguments. Not so with France. Her national claims must necessarily rest on treaty provisions, and the future privileges she desired above all else could in no way be so easily or fully secured as by an admission of the continuing force of those instruments. She therefore insisted that for indemnity we must give treaty recognition. This we absolutely refused to do, and upon this rock twice did the negotiations split, only to be renewed by the patience and patriotism of our ministers. After months of weary discussion the parties stood as to this point exactly where they started, and to save their young and struggling country from further contest the American ministers consented to the compromise. Then the Senate struck the compromise out, and France said in effect, "Yes, we agree, if it is understood that we mutually renounce the pretensions which are the subject of that article," to which the Senate and the President, by their official action, assented.

So died the treaties of 1778, with all the obligations which they imposed, and with them passed from the field of international contention the claims of American citizens for French spoliation.

In this whole transaction the treaties were urged on the one side against indemnities on the other. Admission of the continuing force

of the treaties was the great desire of France to which she subordinated all else, even her national claims; on the other hand, the United States could by no possibility admit such a contention, for to do so would set them instantly at odds with their former enemy. Having given, in 1794, to Great Britain the exclusive port privileges secured to France in 1778, they could not in 1800 again reverse their policy, and, by returning these privileges to France, infringe their agreement with Great Britain.

Yet this was the issue, an issue never retreated from by the French; as they put it, "either the ancient treaties with indemnity [for spoliations] or a new treaty without indemnity." Article 2 of the treaty of 1800 still presents these counter propositions linked together when it postpones the discussion of the treaties, and at the same time postpones the discussion of the indemnities.

When the United States struck out that second article and assented to Napoleon's proviso that by so doing both states renounced the pretensions which were its object (that is, the treaties and these claims), the contract was complete. That there was a "bargain," to use Madison's word, is apparent from the instrument and the negotiations which have been recited as preceding it.

Four years later Mr. Madison, then Secretary of State, instructed Mr. Pinckney, minister in Spain, that "the claims from which France was released were admitted by France, and the release was for a valuable consideration in a correspondent release of the United States from certain claims on them. The claims we make on Spain were never admitted by France nor made on France by the United States. They made, therefore, no part of the bargain with her, and could not be included in the release."

The counsel for defendants contends that Mr. Madison referred in this letter to "national" claims on the part of the United States for national injury, in the destruction of commerce, the increased cost of the Army and Navy, and the insult to the flag. It should be noted, in answer to this position, that the claims against Spain, then under discussion, were exactly these claims now at bar, except that Spain was the party defendant instead of France. As against France captures made by French privateers under French decrees were taken into French ports, and there condemned. As against Spain captures made by French privateers under French decrees were taken into Spanish ports and there condemned by French consuls under the

authority and protection of Spain. Spain plead that these claims were settled by the second article of the treaty of 1800, and it was in answer to this plea that Mr. Madison wrote his letter.

The subject-matter of the instruction to Pinckney was these claims and nothing else, for we were not urging "national" claims on Spain, but the claims subsequently described in the Spanish treaty as those "on account of prizes made by French privateers and condemned by French consuls within the territory and jurisdiction of Spain." (Treaty of 1819, Art. 9.) These claims were finally recognized, and paid through the Florida purchase. (*Id.*, Art. 11; see also treaty of 1802.)

But the negotiations of the Ellsworth mission are conclusive that the claims were not "national" in the sense of governmental as opposed to individual. It is unnecessary to repeat extracts from the correspondence already given, and we need only refer to the project submitted by our ministers, the 18th of April, 1800, which describes the claims as those "of divers merchants and other citizens of the United States" (Doc. 102, pp. 585-589), thus following their instructions, which called them "claims of our citizens." (*Ibid.* 575.)

Mr. Pickering, Secretary of State under the first two Presidents, and who, above all others, was familiar with the situation and with the rights of the parties, said that we bartered "the just claims of our merchants" to obtain a relinquishment of the French demand, and that—

It would seem that the merchants have an equitable claim for indemnity from the United States. . . . The relinquishment by our Government having been made in consideration that the French Government relinquish its demands for a renewal of the old treaties, then it seems clear that, as our Government applied the merchants' property to buy off those old treaties, the sums so applied should be reimbursed. (Mr. Clayton's speech, 1846.)

Mr. Madison, as we have seen, said to Spain that the claims were admitted by France, and were released "for a valuable consideration," and he termed the transaction a "bargain."

Mr. Clay, in the Meade Case, in which his opinion was given in 1821, five years prior to his report upon French spoliations, said that while a country might not be bound to go to war in support of the rights of its citizens, and while a treaty extinction of those rights is probably binding, it appears—

That the rule of equity furnished by our Constitution, and which provides that private property shall not be taken for public use without just compensation, applies and entitles the injured citizen to consider his own country a substitute for the foreign power.

In this conclusion Chief Justice Marshall strongly concurred, saying to Mr. Preston—

Having been connected with the events of the period and conversant with the circumstances under which the claims arose, he was, from his own knowledge, satisfied that there was the strongest obligation on the Government to compensate the sufferers by the French spoliations. (Clayton's speech, 1846.)

And he repeated to Mr. Leigh distinctly and positively "that the United States ought to make payment of these claims."

This view of the distinguished jurist and diplomatist is sustained by forty-five reports favorable to the claims, made in the Congress, against which stand but three adverse reports, all of which were made prior to the publication of the correspondence by Mr. Clay in 1826. Besides Marshall, Madison, Pickering, and Clay, the validity of the claims has been recognized by Clinton, Edward Livingston, Everett, Webster, Cushing, Choate, Sumner, and many other of the most distinguished statesmen known to American history, and while opponents have not been wanting, among the most eminent of whom were Forsyth, Calhoun, Polk, Pierce, Silas Wright, and Benton, still the vast weight of authority in the political division of the Government has been strenuous in favor of the contention made here by the claimants.

The judiciary has seldom occasion to deal with the abstract right of the citizen against his Government; for in a case raising such a question the individual is without remedy other than that granted him by the legislature. The question of right, therefore, is usually passed upon by the political branch of the Government, leaving to the courts the power only to construe the amount and nature of the remedy given. Still judicial authority is not wanting in support of the position that by the agreement with France the United States became liable over to their individual citizens. Lord Truro laid down in the House of Lords as admitted law—

That if the subject of a country is spoliated by a foreign Government he is entitled to redress through the means of his own Government. But if from weakness, timidity, or any other cause on the part of his own Government no redress is obtained from the foreign one, then he has a claim against his own country. (*De Bode v. The Queen*, 3 Clarke's House of Lords, 464.)

The same position is sustained by that eminent writer upon the public law, Vattel, who held that while the sovereign may dispose of either the person or the property of a subject by treaty with a foreign power, still, "as it is for the public advantage that he thus disposes of them, the state is bound to indemnify the citizens who are sufferers by the transaction." (Book 4, ch. 2.)

Napoleon, from his retirement in St. Helena, testified that by the suppression of the second article of the treaty of 1800 the privileges which France had possessed by the treaty of 1778 were ended, and the "just claims which America might have made for injuries done in time of peace" were annulled, adding that this was exactly what he had proposed to himself in fixing these two points "as equi-ponderating each other." (Gourgaud, *Memoirs*, vol. 2, p. 129.)

Finally, Senator Livingston, familiar with the whole subject as a contemporary, in his report upon it to the Senate, said:

The committee think it sufficiently shown that the claim for indemnities was surrendered as an equivalent for the discharge of the United States from its heavy national obligations, and for the damages that were due for their preceding non-performance of them. If so, can there be a doubt, independent of the constitutional provision, that the sufferers are entitled to indemnity? Under that provision is not this right converted into one that we are under the most solemn obligations to satisfy? To lessen the public expenditure is a great legislative duty; to lessen it at the expense of justice, public faith, and constitutional right would be a crime. Conceiving that all these require that relief should be granted to the petitioners, they beg leave to bring in a bill for that purpose.

The word "national" has been largely used in argument in allusion to the different kinds of claims at different periods brought into the discussion, and is a convenient word if clearly understood in the connection in which it is used. All claims are "national" in the sense of the *jus gentium*, for no nation deals as to questions of tort with an

alien individual; the rights of that individual are against his Government, and not until that Government has undertaken to urge his claim—not until that Government has approved it as at least *prima facie* valid—does it become a matter of international contention; then, by adoption, it is the claim of the nation, and as such only is it regarded by the other country. The name of the individual claimant may be used as a convenient designation of the particular discussion, but as between the nations it is never his individual claim, but the claim of his Government founded upon injury to its citizen. Nations negotiate and settle with nations; individuals have relations only with their own Governments. Other claims, sometimes the subject of argument, rest upon injury to the state as a whole; of these an apt illustration is found in the so-called “indirect” claims against Great Britain, disposed of in the arbitration of 1872, and in the claims advanced by France for injury caused by non-compliance with the treaties of 1778.

Thus, while all claims urged by one nation upon another are, technically speaking, “national,” it is convenient to use colloquially the words “national” and “individual” as distinguishing claims founded upon injury to the whole people from those founded upon injury to particular citizens. Using the words in this sense, it appears that in the negotiations prior to the treaty of 1800, and in effect in the instrument itself, national claims were advanced by France against individual claims advanced by the United States. France urged that she had been wronged as a nation; we urged that our citizens’ rights had been invaded. If “national” claims had been used against “national” claims, and the one class had been set off against the other in the compromise, of course the agreement would have been final in every way, as the surrender and the consideration therefor would have been national, and no rights between the individual and his own Government could have complicated the situation. But in the negotiation of 1800 we used “individual” claims against “national” claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this, as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere

be given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his Government.

It seems to us that this "bargain" (again using Madison's word), by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation. We do not say that for all purposes these claims were "property" in the ordinarily accepted and in the legal sense of the word; but they were rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment the moment the Government had adopted them and promised to enforce them, as it did in August, 1793, and constantly thereafter. That the use to which the claims were put was a public use can not admit of a doubt, for it solved the problem of strained relations with France and forever put out of existence the treaties of 1778, which formed an insuperable obstacle to our advance in paths of peace to the achievement of commercial greatness.

The defendants urge further that the treaty of 1803 finally disposed of all pretensions of citizens of the United States in regard to these spoliations.

One of the principal objects of this treaty is found in the instructions to Mr. Livingston, our minister, wherein the Secretary of State directed his particular attention to claims embraced in the fourth article of the treaty of 1800, describing them as arising from: "(1) Cases of capture wherein no judicial proceedings have been had; (2) cases carried before French tribunals, and not definitively decided on the 30th September, 1800; (3) captures made subsequent to that date." (Madison to Livingston, Sept. 28, 1801, Doc. 102, p. 701.)

Accordingly Mr. Livingston in January following complained to the French Government of infractions of the existing treaty (of 1800) in relation to "vessels taken after its signature," "vessels previously taken where no judicial proceedings had been had," "vessels on which no definitive sentence had been given before that day," or which were removable to the council of prizes; these are fourth-article claims embraced in the *modus vivendi* therein provided. Claims for vessels

which were to have been restored are clearly not claims which had matured prior to September 30, 1800, when the treaty was signed. (*Ibid.* 704.)

In the next month (February 24, 1802) Mr. Livingston speaks of the differences as "debts," about which he must transmit to his Government a statement of the measures about to be adopted by France, "with a view either to afford it the satisfaction that it will always feel in contributing to the interests of France . . . or of putting a stop to credits that must be ruinous to its citizens already suffering under heavy losses sustained by the detention of a considerable capital in the hands of the French Government." (*Ibid.* 708.) It is thus apparent that these claims, in the view of the negotiator, rested substantially on contract, and it is further apparent from the text of the note that these contracts were for supplies to the French fleets and armies.

This is the first subject of negotiation; the second is as to the council of prizes, about which there were "daily complaints of their entire disregard of the treaty," so much so that when a vessel was ordered restored it was sent back in a damaged state and charged with cost of "detention, storage, etc." Fourth-article claims these, as we have already seen.

Livingston later (April 17, 1802), in discussing the fifth and second articles of the treaty of 1800, says:

The fifth article expressly stipulates that all debts due by either Government to the individuals of the other shall be paid, but as this would also have included the indemnities for captures and condemnations previously made, and it was the intention of the contracting parties, by the second article, to preclude this payment as depending on a future negotiation, it was necessary to except from this promise of payment all that made the subject of the second article. . . . On its [the second article] being erased, the fifth article stands alone as a promise to pay, with the single exception of indemnities for captures and condemnations. (*Ibid.* 717.)

And he adds that so far as relates to indemnities for captures and condemnations which had been made previous to the signature of the treaty his demands could not be supported.

It seems hardly necessary to quote further from the correspondence, which shows that Mr. Livingston not only never had in mind, but

expressly excluded, second-article claims, directing his attention first to debts, "confirmed by treaty," as he says (*ibid.* 729), and second, to vessels seized during or after the negotiation of the treaty of 1800; that is, claims "confirmed," to use his word, by that treaty's fourth and fifth articles.

The distinction between different classes of claims then existing between the United States and France must be clearly marked out before the treaty of 1803 can be properly understood. The second article of the treaty of 1800 covered claims for illegal seizures and condemnations which were tied to the treaties of 1778. But all the illegal captures were not covered by that second article, for the fourth article treated of others; that is, of "property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications;" and this property, it was agreed, should be restored. That is, while the negotiations of the Ellsworth mission were proceeding the French decrees remained in force and spoliations had not stopped; the cases of some seized American vessels were then pending before the French tribunals, and these were the ones to be restored if not "definitively condemned" by the time the treaty became a law; others might be seized pending the discussion and before exchange of ratifications; in fact such seizures were made, and these also were to be restored.

Additional proof that this fourth article was in effect a mere *modus vivendi* is found in its concluding paragraph, which provides that it shall take effect from the date of signature, not from the exchange of ratifications, and that if any property should be condemned—that is condemned in the future—before knowledge of the stipulation "shall be obtained, the property shall without delay be restored or paid for." Now, the property covered by this article, to wit, that then before the tribunals or which might thereafter come before the tribunals before the new treaty took effect, never was restored or paid for, although spoliations continued for some time.

It is important here to note the distinction between the position as against the French Government of cases pending during the negotiation or which might thereafter arise and that of cases now before this court wherein the condemnation had occurred before. This claim and those like it were "claims to indemnity" merely; the property had disappeared and could not be restored, the French tribunals had definitively acted, and payment for it would be made only upon admission

by the United States of the continuing force of the ancient treaties; while, as to then pending cases the property could be restored, or in case of mistaken sale its value could be easily and immediately ascertained, and the fourth article absolutely promised restoration or payment.

The agreement of 1803 is contained in three instruments forming the contract by which we acquired Louisiana; these treaties give no rights to these claimants, as is popularly supposed; on the contrary, it is contended by the Government that any rights which ever existed were destroyed by them. The third treaty, providing for the payment of "sums due by France to the citizens of the United States," is the only one bearing upon these cases.

Article 1 provides that these "sums," called "debts," contracted before September 30, 1800 (the date of the prior treaty), shall be paid, with interest.

Article 2 describes the debts as those set forth in an annexed conjectural note, which is a list of claims allowed by the French accounting officers for such articles as rice, flour, salt beef, cloth, leather, cotton and indigo, wines and spirits; while article 6 limits the preceding articles to debts still due American citizens yet creditors of France "for supplies, for embargoes, and prizes made at sea in which the appeal has been properly lodged within the time mentioned in the convention" of 1800. But there is no such time mentioned in that convention, nor is there a word in it looking to any appeal whatever from decisions of inferior tribunals; the only provision about prizes in that treaty is that contained in its fourth article, directing that in the future they be restored.

Proceeding now to article 5 of this somewhat mysterious instrument of 1803, we find another limitation upon the preceding articles, to wit, that they shall cover only captures wherein the council of prizes has ordered restitution if the claim was valid against France, and then only in case of "insufficiency of the captors," *i. e.*, that the privateer's bond was not good. Further, it shall apply to debts mentioned in the fifth article of the treaty of 1800, that is, "debts" (not claims for damage by tort) due by one nation to citizens of the other, and this fifth article of 1800 expressly bars claims for captures or confiscations, while the fifth article of 1803 expressly does not comprehend "prizes whose condemnation has been or shall be confirmed." Therefore, by this series of limitations, the scope of the treaty of 1803 is

confined on its face, and so far as the cases at bar are interested in it, to captures, of which the council of prizes shall have ordered restitution," provided the claim was a valid one and the captor insufficient. Really, there does not seem very much left of it, so far as "embargoes and prizes made at sea" (Art. 4) are concerned.

The significant fact is stated to us by counsel in this connection that there were presented to the commission formed under the treaty of 1831, which we shall soon have occasion to examine, claims for two vessels, the *Caroline* and the *Orlando*, which were rejected upon the express ground that the captures were made prior to September 30, 1800. Further, the report of the board under the treaty of 1803 shows that only eight captures at sea were allowed, a ridiculously small number if the class of claims now at bar were within the jurisdiction of that tribunal.

That the settlement and payment of "debts," not of claims for tort, was the primary object of the treaty of 1803 is explained in its preamble and is apparent from its text, while the treaty of 1800 dealt with torts and indemnities for wrongs committed upon our commerce. The claim for debts was not sacrificed by the treaty of 1800, but kept alive by the fifth article, which, in further proof of the abandonment of claims for tort, explicitly excepted from the benefits of its provisions all "indemnities claimed on account of captures and confiscations." But these "debts contracted by one of the two nations with individuals of the other" were not paid as the treaty of 1800 promised, nor, as Mr. Livingston said to the French Government in 1802, was there the most "distant hope of their payment." (Doc. 102, p. 714.)

The association of the second and fifth articles of the treaty of 1800 in the preamble of the treaty of 1803 has been deemed significant as showing an intention to revive and settle the second-article claims now commonly known as "spoliation" claims, whereas the allusion was intended to reaffirm the exclusion of these claims already made by the second article; for the fifth article (1800) includes "debts" which are to be settled and expressly excludes "indemnities"; that is, excludes the subject-matter of the second article, which was not to be settled; so that France, being desirous in 1803, as the preamble says, "in compliance with the second and fifth articles of the convention of 1800 to secure the payment of the sums due by France to the citizens of the United States," covenanted to pay "debts," not indemnity for torts other than those specified, and which had been turned into debts by

the fourth article of the treaty of 1800. To put it in another form: as the original second article had ceased to exist, and was replaced by a provision that the treaty should last eight years, of course a reference to this new second article in the treaty of 1803 would have been absurd; so we must conclude that the negotiators referred to the original second article, the article which had been expunged by agreement. That article, so far as claims of citizens were concerned, referred to torts and nothing else; the fifth article referred to "debts," and provided that payment should be made therefor; and then went on to make an express exclusion from its benefits of claims for captures and confiscations, that is, claims arising from torts which were covered by the second article as it then stood. What more natural, then, that, in rehearsing the objects of the treaty of 1803, the two articles should be brought together in the preamble, the fifth article as embracing the debts due and the second article as covering the express exception made in the fifth article, which "includes debts contracted," and excludes "indemnities claimed on account of captures and confiscations"? The language of the preamble is, therefore, in compliance with the second as well as with the fifth article of the treaty of 1800.

We are of opinion that the treaty of 1803 had no reference to the claims embraced in the second article of the treaty of 1800.

Turning to the particular case now on trial we consider it with the principle admitted that the claims popularly known as "French spoliation claims" were, as a class, and if embraced in the description of the second article of the treaty of 1800, valid claims against France, which were surrendered by our Government for the valuable consideration found in a release from the obligations of the treaties of 1778, and that, by this action, the Government of the United States assumed the liabilities of France in regard to them, and is in duty bound to recompense the individuals who suffered loss by the illegal captures and condemnations.

The findings show that the schooner *Sally*, owned by Americans, commanded by an American, and laden with an American cargo, while on a commercial voyage from Massachusetts to Spain, was, on the 5th day of June, 1797, seized by the French privateer *Intrépide*, taken to the port of Nantes, there condemned by a French tribunal, and "confiscated" for the benefit of the privateer. It was not alleged that she had violated the law of nations, either by attempting a blockade or by carrying contraband, or in any other manner, but that she had violated

a local French municipal regulation "concerning the navigation of neutrals." It appears upon the face of the decree that the Government of France, through laws passed by its own legislature, valid within its territorial jurisdiction and upon its own ships, but not elsewhere, attempted to regulate the conduct of neutral merchantmen upon the high seas, where they were subject only to the laws of their own country and that law of abstract right and justice which by mutual consent has become crystallized into the law of nations.

To learn wherein the schooner violated the French decree we must turn to the findings, which rehearse the judgment of the tribunal, as follows:

"That while the master may be correct in the sum total of his clearance papers he is flagrantly at fault as to his crew-list," and "considering that the obligation common to the French nation and to the United States, and which constitutes the safety of their respective navigation, is defined by the treaty of February 6, 1778, which decides, articles 25 and 27, that every captain who receives a passport must be provided with a list, signed and attested by witnesses, containing the names and surnames and place of birth and residence of the persons composing the crew of his ship and of all persons embarking upon her, which he will not receive without the knowledge and permission of the naval officers. Considering that the memorandum or crew-list fulfills none of these formalities, inasmuch as it is unsigned, that the places of birth and residence of the men composing the crew are not declared, and the permission of the naval officer is not given; considering that article 6 of section 7 of the marine regulations of 1781 declares to be lawful prize the cargoes of confiscated ships," and "considering finally that article 4 of the decree of the Executive Directory of the 12th Ventose, year five, is clear and precise, and that it declares to be a good and lawful prize every American ship which shall not have a crew-list in due form such as is described by the model annexed to the treaty of February 6, 1778," therefore, the court, in conformity with these laws, and especially with article 4 of the said decree, declared valid the capture of the *Sally* and her cargo, and declared the captain to belong to the "enemies of the Republic" because he did not have a crew-list in conformity with the French decree.

The vessel and cargo were confiscated because the crew-list, the "*rôle d'équipage*," was not in form, although there is not a word or sentence, as the French afterwards admitted (Doc. 102, p. 637), in the

treaties of 1778 requiring any such document. The French decree required it, but we can not admit that the government of a foreign country may stretch its arm over the ocean, and, seizing an American vessel, direct it as to the papers it shall carry, under penalty of confiscation. There is no allegation in the proceeding that the *Sally* did not have all the papers, other than this crew-list, required by the treaty of 1778 and the laws of the United States. In fact, the court itself admits this in saying that the captain is correct "in the sum total of his clearance papers, . . . but flagrantly in fault as to his crew-list." How flagrantly at fault? He had complied with the laws of his country, he had not violated a provision of the treaties of 1778, and it is not hinted that he infringed the law of nations or intended to do so.

The confiscation rests upon the decree of March 2, 1797, authorizing the seizure and condemnation of every American vessel not having on board "a *rôle d'équipage*, in proper form, such as is prescribed by the model annexed to the treaty of the 6th of February, 1778." A "*rôle d'équipage*" is for all practical purposes a "crew-list," although technically, under French regulations, it contains the names of all on board, including the passengers. Still "crew-list" is a sufficient translation for the purposes of this case.

The treaty of 1778 required vessels of each party to be furnished with a passport and a certificate as to her cargo and destination, but no mention whatever is made of a crew-list. Seizures on account of the lack of this instrument were, however, made even before the decree of March, 1797, and our consul-general, in calling attention to this fact, said to the minister of foreign affairs (Feb. 23, 1797, *ibid.* 155):

By no regulations of the United States are our ships subjected to this formality; and not one of our vessels has (*rôle d'équipage*) a crew-list thus countersigned. Moreover, in the different treaties and conventions that connect France with America there is not found a single article sufficient to justify the doctrine set forth by the privateer. . . . I consider it unnecessary for me to communicate on this subject the right and supreme law of nations, being persuaded that you will think with me that every free and independent nation should possess the exclusive right to establish regulations for the management of their own navigation; and that no nation possesses the right to subject the citizens of another power to formalities to be observed in a foreign country not exacted by the laws of said country or by those to which said citizens

belong. . . . The principle which the captain [of the privateer] desires to see established would lead to the condemnation of all the ships belonging to my nation actually found in the different ports of France, under the faith of treaties, and to authorize the cruisers of the Republic to capture all our merchantmen.

Mr. Pinckney afterwards (May 15, 1797, *ibid.* 171) writes:

Our papers are, as they ought to be, according to the maritime laws of our country.

And again (June 28, 1797, *ibid.* 176):

Mr. Adet [the French minister] arrived at Havre in an American ship without a *rôle d'équipage*. The *Courier Maritime du Havre* . . . infers that Mr. Adet must have been convinced, with all other publicists, that a *rôle d'équipage* was not necessary, and that all that was requisite was a passport conformable to the model annexed to the treaty of 1778.

Mr. Pickering, then Secretary of State, wrote the next year (Dec. 13, 1798, *ibid.* 429):

There is no shadow of foundation for the claims set up by the French Government of the necessity of our vessels being provided with a *rôle d'équipage*.

In default of express treaty provision no Government can prescribe to our merchantmen navigating the high seas the detailed form and number of the papers they are to carry, nor seize or confiscate those merchantmen for non-compliance with that nation's municipal statutes. The seizure of this vessel, and of others under like conditions, was clearly illegal and unjustifiable.

The defendants say, further, the condemnation can not be illegal because made by a prize court having jurisdiction, and the decisions of such courts are final and binding. This proposition is of course admitted so far as the *res* is concerned; the decision of the court, as to that, is undoubtedly final, and vests good title in the purchaser at the sale; not so as to the diplomatic claim, for that claim has its very foundation in the judicial decision, and its validity depends upon the justice of the court's proceedings and conclusion. It is an elementary doctrine of diplomacy that the citizen must exhaust his remedy in the

local courts before he can fall back upon his Government for diplomatic redress; he must then present such a case as will authorize that Government to urge that there has been a failure of justice. The diplomatic claim, therefore, is based not more upon the original wrong upon which the court decided than upon the action and conclusion of the court itself, and, diplomatically speaking, there is no claim until the courts have decided. That decision, then, is not only not final, but, on the contrary, is the beginning, the very corner-stone, of the international controversy. This leads us naturally to another point made by the defense in that the claimant did not "exhaust his remedy," because he did not prosecute an appeal. We of course admit that usually there is no foundation for diplomatic action until a case cognizable by the local courts is prosecuted to that of last resort; but this doctrine involves the admission that there are courts freely open to the claimant, and that he is unhampered in the protection of his rights therein, including his right of appeal. It is within the knowledge of every casual reader of the history of the time that no such condition of affairs in fact then existed.

The very valuable report of Mr. Broadhead shows (pp. 6 and 7) that prior to March 27, 1800, there was practically no appeal in these cases except to the department of the Loire-Inférieure; in the then existing state of bad feeling and modified hostilities, and under the surrounding circumstances, this was to the captains of the seized vessels, in most if not in all cases, a physical impossibility. Nor prior to the agreement of 1800 was there any practical reason for appealing to a court when the result, as our seamen believed, whether rightly or not, but still honestly, was a foregone conclusion, and while negotiations were progressing for a settlement; nor is there anything in these negotiations showing that a technical exhaustion of legal remedy would be required. We are of opinion that the claimant was not, under these purely exceptional circumstances, obliged to prosecute his case through the highest court, even if he could have done so, which we doubt.

This court is forbidden by the act conferring jurisdiction not only to examine claims embraced in the treaty of 1803, which we have considered, but also those allowed and paid in whole or in part under the treaty of 1819 with Spain and those allowed in whole or in part under the treaty of 1831 with France.

The reference heretofore made in this opinion to the Spanish treaty

is sufficient to show its inapplicability to vessels seized on the high seas by a French privateer, taken to a French port and there illegally condemned and confiscated; so that treaty may be thrown out of the consideration of this case.

The treaty of 1831 is a claims treaty, by which the French Government, "in order to liberate itself completely from all the reclamations preferred against it by citizens of the United States for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property," agreed to pay 25,000,000 francs to the United States, for distribution (Art. 1), while the United States on their part agreed to pay to France for claims, described in language somewhat similar, the sum of 1,500,000 francs (Art. 3). As to other claims each country opened its courts to the citizens of the other, and finally France abandoned its demands under the eighth article of the Louisiana treaty in return for a reduction of duties upon French wines.

The wording of this treaty is broad enough at first glance to sustain the defendants' contention that these claims are included in it; but treaties and statutes, like every other document, must be read in the light of the facts as they existed at the time. A treaty now made with Great Britain providing a settlement of "all claims" could not be held to reopen the proceedings of the Geneva arbitration and to authorize payment of claims there dismissed, for the award was final, both as to what was allowed and as to what was refused. Nor could a similar general convention with France permit an opening of the proceedings of the Franco-American Commission with possible payment of claims there refused and declared forever barred.

Such treaties look not to dead issues, but to living pending claims, forming at the time a subject of contention between the Governments, and not to those universally regarded as finally settled. Claims of the class of the one at bar had been disposed of in 1801, when the President and Senate concurred in Napoleon's stipulation as to the second article, and since that time, although they had been constantly pressed upon the United States as an obligation of that Government to its citizens, they nowhere appear as a subject of discussion between the nations. France, by the treaty of 1831, desired to liberate itself from claims "preferred against it," by citizens of the United States, but these spoliation claims were not then being preferred against it; on the contrary, since 1801 the claimants had turned their attention ex-

clusively to the United States, recognizing the force and effect of what was called the "retrenchment of the second article." The French Government clearly understood this treaty of 1831 as excluding all American claims of every description originating prior to the treaties of 1803. (Ex. Doc. 147, 22d Cong., 2d sess., p. 165.)

Our commissioners who distributed the fund also so understood it, and required every claimant to show that his "claim remained unimpaired and in full force against France" in 1831. (House Ex. Doc. 117, 24th Cong., 1st sess., p. 4.) But these spoliation claims had not only been impaired but destroyed as a French obligation by the treaty of 1800; many cases of captures made prior to September 30, 1800, were presented to the board and rejected. (Sumner's Report, p. 35.)

A broad distinction is made in the remedial statute (January 20, 1885) between the claims described in these different treaties of 1803, 1819, and 1831. As to the treaty of 1803 the act does not extend to claims "embraced" in its provisions; as to the treaty of 1819 the act does not extend to claims "allowed and paid in whole or in part" under its provisions; as to the treaty of 1831 the act does not extend to claims "allowed in whole or in part" under its provisions. It is not contended that this claim was "allowed in whole or in part" under the provisions of the treaty of 1831.

We have not considered the point that the treaties of 1778 were abrogated by the act of Congress passed in 1798. That question, which the ablest minds of the period were unable to solve, and which proved an ever present and enduring obstacle to all negotiation until forcibly removed by Napoleon, with our concurrence, we fortunately are not forced to deal with. The rights of this claimant rest upon no convention, but are founded upon international law. Treaty or no treaty, a foreign nation can not be permitted to confiscate an American merchantman engaged in legitimate commerce upon the high seas because his crew-list does not fulfill the requirements of that nation's local ordinances. That the act of Congress was binding within the jurisdiction of the United States and was necessarily to be so regarded by our courts does not now admit of question. The treaties were, however, not only part of the supreme law of the land wherein they were replaced, within the jurisdiction of the Constitution, by a later supreme law, to wit, a statute; but they were also, as between the two Republics, contracts, which one of the parties attempted to annul. Treaties containing no clause fixing their duration are, under certain

circumstances, voidable at the option of one party. Whether there existed in 1798 such circumstances as authorized and made valid an abrogation of the treaties of 1778 by the United States was the very question left unsettled by the treaty of 1800, the one question upon which by no possibility apparently could the parties agree.

For the same reason we find it unnecessary to examine how far the French violated the agreement by their treaty of 1786 with Great Britain (15 Martens, *Recueil de Traités*, 2 ed., vol. 4, p. 155), or the effect, by way of abrogation of these agreements, of the Jay treaty, or the change in the form of government in France.

Some argument has been made as to the ownership of this claim, based upon the provision of the statute that the court shall determine "the present ownership, and if by assignee, the date of the assignment, with the consideration paid therefor." (§ 3.) Whatever may have been the intention of Congress in inserting this provision, its terms are perfectly clear; the findings of fact show in this case that the claimant is the administrator with the will annexed of the owner of the *Sally*, and show all other facts necessary to a decision upon the subject, except as to one of the defendants' points; as to this we can not agree that Congress intended this court to perform what is in effect a physical impossibility and to throw upon us the task of probate courts in the investigation of the rights of thousands of descendants and devisees of the original claimants, who are now scattered, in all human probability, to the four quarters of the globe. To ask this court to go back to the year 1800 and follow from that time down the succession of every then existing claimant is to ask us to do that which under our jurisdiction and powers would be an impossibility. A much more reasonable interpretation of the act appears upon its face, and applying that interpretation to this case we have found that the claimant, as administrator of the owner of the schooner *Sally*, is the owner of the claim. We consider it no part of our duty under the statute to place ourselves in the position of a court of probate and report to Congress the manner in which any ultimate recovery should under the laws of the thirty-eight States and eight Territories of this Union be distributed among the numerous next of kin or devisees of the original claimants and their descendants. The administrators are officers of those probate courts, subject to their jurisdiction and control, and presumably have filed adequate bonds for the honest and proper performance of the trust reposed in them.

Congress asks us for two facts: First, the present ownership. The owner, both in law and equity, the Supreme Court has said, is the administrator (*Villelonga's Case*, 23 Wall. 35), and that suffices for this particular case. Secondly, Congress asks, where there has been an assignment, not only the name of the present owner, but the date of the assignment and the consideration paid therefor. Of course these facts will be reported when such a case is presented.

So we reach the end of this opinion as unlike the usual judicial expression in its form and supporting authorities as are the cases before us unlike those ordinarily submitted to a tribunal of the law. We are, however, for the moment invested with some of the powers and jurisdiction belonging to the political branch of the Government, and upon us is imposed an examination not usually or naturally committed to a judicial body. We have been required not to investigate legal rights, based upon the doctrines and principles of the common law, but to inquire into and to report upon the ethical rights of a citizen against his Government; rights which are never enforceable except by the consent of the sovereign—in this country the legislature—as whose substitute we act to the limited extent prescribed and marked out by the remedial statute.

The result which we have reached is supported by resolutions passed in each of the thirteen original States, by twenty-four reports made to the Senate by its committees, by over twenty similar reports made to the House of Representatives, by the fact that while three adverse reports have been made, one to the Senate and two to the House, no adverse report has been made in either body since the publication of the correspondence in 1826, and by the further facts that the Senate has passed eight bills in favor of these claimants, and the House has passed three of these, of which one is the present law, the other two having been vetoed, one by President Polk, substantially upon grounds not at this time important, the other by President Pierce for reasons which we have considered very fully in this opinion, and with which, after the most careful and painstaking consideration, we can not agree.

The arguments of counsel for claimants, marked as they were by ability, industry, and a frank desire for a just ascertainment of the rights involved, have been of great assistance to us; while the learned assistant attorney for the United States has presented the defense with a zeal and force of argument which we do not find in the history of the long discussions it has heretofore received.

The chief justice and all the judges concur in this opinion, and we shall, in accordance with the statute, report to Congress the conclusions of fact and law in this claim, together with a copy of this opinion, which contains (using the words of the statute) the conclusions which, in our judgment, "affect the liability of the United States therefor."

THOMAS CUSHING, ADMINISTRATOR, v. THE UNITED STATES¹

[French Spoliations No. 132. Decided December 6, 1886]

On the Defendants' Motion

The general question of the liability of the United States for claims released to France by the treaty of 1800 is decided in the case of *Gray* (21 C. Cls. 340). Subsequently during the term, the law officers of the government move for a rehearing. All of the questions involved are re-argued and reconsidered.

- I. The French Spoliation Cases can not be maintained as subjects of legal right founded on municipal law; but Congress with full knowledge of the law and the facts, directed that they be investigated and determined under a different and broader rule, viz., "*According to the rules of law, municipal and international, and the treaties of the United States applicable to the same,*" Act of January 20, 1885. (23 Stat. L. 283).
- II. The question, what are "*valid claims to indemnity upon the French Government,*" is international and not within the scope of ordinary judicial inquiry, and is to be measured by rules which relate to the rights and obligations of nations.
- III. The purpose of the French Spoliation Act of 1885 is that the judicial shall assist the political branch of the Government in determining certain rights not enforceable in courts, but which are nevertheless obligatory under international law and the Constitution.
- IV. The court now adheres to its former conclusions (1) that the French depredations upon American commerce were illegal; (2) that the United States by the treaty of 1800 set off these claims against others maintained by France, and released them for a valuable consideration beneficial to this nation; (3) that an appeal from a prize court is not an indispensable prerequisite to diplomatic interference and amid the circumstances is no defense in this case.
- V. It is the purpose of the Spoliation Act that the court shall determine whether each claim brought before it is valid as against France, and whether the United States became liable over to the individual.
- VI. Neither original of the treaty of 1800 with France can be found; but the published copies differ only in the caption, which is not a part of a treaty, and is usually the work of an editor.

¹Court of Claims Reports, vol. 22, page 1.

- VII. The treaty was not a treaty of peace, nor did it conclude or recognize a state of war or a condition of hostilities. The decision in *Bas v. Tingy* (4 Dallas, 37), and the statutes to which the decision refers, examined and explained.
- VIII. The treaty is not an adjudication of these claims adverse to this Government. Its own terms negative that assumption; so do the negotiations which led to it, and so does the act of 1885.
- IX. The reprisals of this country upon France were most limited in their nature; were allowed by the natural laws of self-defense, and defined and regulated by acts of Congress which were defensive in character, allowing French merchantmen to pursue their voyages unmolested and to refit and provision in our ports.
- X. The seizure of an American merchantman can not be justified by the fact of her having been armed for defensive purposes. During the last century substantially all vessels were armed against pirates.
- XI. Condemnations of prize courts are final in actions between individuals, and as to the vessels condemned, giving purchasers a good title as against all the world, but do not bind foreign nations nor bar claims valid by international law.
- XII. The rights of prize courts are the rights of the capturing states. Their decrees do not relieve the state from responsibility nor preclude other powers from seeking redress or investigating the captures *de novo*.
- XIII. The absence of a ship's papers may be punishable within local jurisdiction as a police measure, but never by absolute confiscation, if it be shown that the vessel was innocently pursuing a legitimate voyage.

The Reporters' statement of the case :

The cases now argued and submitted are the same as those determined at the last term (21 C. Cls. 340, 430), the present motion being merely a means for reviewing and resubmitting the legal questions previously considered. The cases were reported to Congress on the same day that this motion was decided. The findings in those cases are given below.

The Schooner Industry

- No. 132. Thomas Cushing, administrator of Marston Watson.
- No. 258. Charles F. Adams, administrator of Peter C. Brooks.
- No. 258. William Sohler, administrator of Nath. Fellowes.
- No. 1918. H. W. Blagge and Susan B. Samuels, administrators of Crowell Hatch.

FINDINGS OF FACT

These cases having been tried together before the Court of Claims, William E. Earle, Esq., appearing for Thomas Cushing and Charles F. Adams, Edward Lander, Esq., for William Sohier, and George S. Boutwell, Esq., for Blagge and Samuels, claimants; and Benjamin Wilson, Esq., assistant attorney in the Department of Justice, with Robert A. Howard, Assistant Attorney-General, for the defendants, the court, upon the evidence, finds the facts to be as follows:

I. The schooner *Industry*, a duly registered vessel of the United States, of which Benjamin Hawkes was master, sailed on a commercial voyage from the port of Boston, Mass., June 1, 1798, bound for Surinam with a cargo of merchandise, both owned by Marston Watson, a citizen of the United States residing in said Boston, now deceased; said vessel was lawfully pursuing her voyage when she was seized and captured on the high seas by the French privateer *Victoire*, Captain Bandry, on the 26th of July, 1798, and was taken into the French port of Cayenne, and there libeled, condemned, and sold as a prize.

II. The sole ground of condemnation was that the *rôle d'équipage* which she had on board was "signed only by one notary public, without the confirmation of witnesses," and that there was written on the back of said *rôle* an unsigned certificate that a *rôle d'équipage* was unnecessary.

III. The value at the time of said seizure was as follows:

Vessel	\$1,500
Freight	2,500
Cargo of merchandise.....	10,555
Cost of insurance.....	4,000
Total value	\$18,555

IV. Said Watson had insurance thereon to the amount of \$12,000, which the claimant, Cushing, his duly appointed administrator, admits was paid to said Watson, or that he is chargeable with the receipt thereof. Crowell Hatch, William Smith, David Greene, Benjamin Bussey, and Nathaniel Fellowes, all citizens of the United States, were among the insurers, each for \$1,000, through Peter C. Brooks, also a citizen of the United States, an insurance broker, which said sums were paid to said Marston Watson on or before February 20, 1799, as for a total loss of said schooner with the cargo.

V. Henry W. Blagge and Susan B. Samuels are the duly appointed administrators of said Crowell Hatch, deceased, and William Sohler is the duly appointed administrator of said Nathaniel Fellowes, deceased, and in their said representative capacity they are the present owners of the claims of their respective intestates above set out.

VI. Said Smith, on the 15th of December, 1801, in consideration of \$4,000 and the assumption by said Brooks of all the disadvantages of the said Smith as an underwriter in the office of the said Brooks and said Greene, on the 23d of December, 1801, in consideration of \$6,000, and the assumption of the disadvantages of said Greene as an underwriter in the office of said Brooks and said Bussey, on the 15th of February, 1805, in consideration of \$10,000 and the assumption by said Brooks of the disadvantages of the said Bussey as an underwriter in the office of the said Brooks, assigned to said Brooks all their respective underwriting accounts in his said office; and said Charles F. Adams, administrator aforesaid in said representative capacity, is the present owner of said claims so assigned.

VII. Said claims were not embraced in the convention between the United States and the Republic of France concluded on the 30th of April, 1803. It was not a claim growing out of the acts of France, allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain, concluded on the 22d of February, 1819, and it was not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th of July, 1831.

CONCLUSIONS OF LAW

The court finds as conclusions of law that said seizure and condemnation were illegal, and the owners and insurers had valid claims therefor upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and were entitled to the following sums:

Marston Watson, owner of the vessel and cargo.....	\$18,555
Less the amount of the insurance.....	12,000
	<hr/>
Balance.....	\$6,555

William Smith, David Greene, and Benjamin Bussey, represented by Charles Francis Adams, administrator of Peter Chardon Brooks,

assignee, Crowell Hatch, and Nathaniel Fellowes, each \$1,000, the amount of insurance paid by them respectively.

That said claims were relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which, in our judgment, affect the liability of the United States therefor, are set forth in the opinions of this court, delivered May 17 and 24, and December 6, 1886.

The Schooner *Delight*

No. 505. George Holbrook, administrator of Edward Holbrook.

No. 249. Charles Francis Adams, administrator of Peter C. Brooks.

No. 249. Ebenezer Gay, executor of the last will and testament of Ebenezer Gay, who was assignee in bankruptcy of Thomas English.

No. 249. Charles T. Hunt, administrator of Joseph Russell, surviving partner of Jeffrey & Russell.

No. 249. Henry W. Blagge and Susan B. Samuels, administrator and administratrix of Crowell Hatch.

No. 252. Charles Francis Adams, administrator of Peter C. Brooks.

FINDINGS OF FACT

These cases, involving a claim under the act of January 20, 1885, were heard by the Court of Claims. The claimants were represented by William E. Earle, Esq., Messrs. Shellabarger & Wilson, and George S. Boutwell, Esq.; and the defendants by Benjamin Wilson, Esq., assistant attorney, with whom was the Assistant Attorney-General. After hearing the parties, their proofs, and arguments, the court from the evidence find the facts to be as follows:

I. That the schooner *Delight*, an American registered vessel of 78 and a fraction tons, owned by Asa Payson and Edward Holbrook, both of Boston, Mass., sailed upon a commercial voyage from Boston to St. Bartholomew's, June 22, 1799, laden with a cargo of bacon, soap, candles, butter, and similar goods.

II. That said vessel and cargo were owned by Payson & Holbrook,

with an adventure, belonging to Stephen Curtis, the captain, all of whom were citizens of the United States.

III. That on July 2, 1799, the owners obtained of Peter Chardon Brooks a policy of insurance on said schooner for \$1,500, and on said cargo for \$4,500, whereon the hereinafter named insurers underwrote as stated.

IV. That on June 21, 1799, Stephen Curtis obtained a policy of insurance of \$500 on his adventure, whereon Tuthill Hubbard underwrote \$500.

V. That the schooner *Delight* and her cargo was captured by the French privateer, *La Courageuse*, Captain Vendibourg, July 19, 1799, and condemned at Guadeloupe.

VI. That the sole grounds for the condemnation were that a part of the cargo was English merchandise, and that the *rôle d'équipage* was deficient.

VII. That the cargo contained nothing contraband of war, under the treaty of February 6, 1778, and nothing English.

VIII. That the cargo owned by Payson & Holbrook was worth \$5,959, and the insurance paid thereon being \$4,500, they lost on the cargo \$1,459; that the schooner was worth \$3,243, and the insurance paid thereon being \$1,500, the loss thereon was \$1,743; that the freight was reasonably worth \$2,500; that the insurance premium paid was \$600, making \$6,302.

IX. That the said underwriters named in Finding No. III paid the said several sums for which they underwrote, amounting to \$6,000, and Tuthill Hubbard also paid the amount for which he underwrote, as found in Finding No. IV, and thereupon the insured abandoned to the underwriters in writing to the extent of the insurance.

X. Crowell Hatch, Tuthill Hubbard, William Smith, Jeffrey & Russell, Benjamin Homer, Thomas English, David Greene, Daniel Denison Rogers, all citizens of the United States, were insurers for the following sums, to wit: Said Hatch, Hubbard, Smith, and Jeffrey & Russell, each in the sum of \$1,000, said Homer, English, Greene, and Rogers, each in the sum of \$500, through Peter Chardon Brooks, also a citizen of the United States and an insurance broker, which said sums were paid to the said Payson & Holbrook before January 25, 1800, as and for a total loss of said schooner and cargo.

XI. Tuthill Hubbard, a citizen of the United States, was an insurer in the sum of \$500, through Peter Chardon Brooks, a citizen of the

United States and an insurance broker, which said sum was paid to Stephen Curtis before January 25, 1800, as and for a total loss of his adventure on board of said schooner.

XII. Henry W. Blagge and Susan B. Samuels are the duly appointed administrators of Crowell Hatch, deceased, and Charles F. Hunt is the administrator, *cum testamento annexo*, of Joseph Russell, deceased, surviving partner of Jeffrey & Russell; and Ebenezer Gay is the executor of the last will and testament of Ebenezer Gay, assignee in bankruptcy of Thomas English, deceased; and in their representative capacities they are the present owners of the claims of their respective decedents herein set forth.

XIII. That said Smith, on the 16th of December, 1801, in consideration of \$4,000 and of the assumption of the liabilities of the said Smith as an underwriter in the office of Peter Chardon Brooks; and said Greene, on the 23d day of December, 1801, in consideration of \$6,000 and the assumption of the liabilities of the said Greene in the office of said Brooks as an underwriter; and said Rogers, on the 19th of October, 1804, in consideration of \$3,400 and the assumption of the liabilities of the said Rogers as an underwriter in the office of the said Brooks; and the said Homer, on the 23d of July, 1805, in consideration of \$5,000 and the assumption of the liabilities of the said Homer in the office of the said Brooks as an underwriter; and the said Hubbard, on the 4th of April, 1808, in consideration of \$60,000 and of the assumption of the liabilities of the said Hubbard in the office of the said Brooks as an underwriter, assigned to the said Brooks all their respective underwriting accounts in his said office.

XIV. That said claims were not embraced in the convention between the United States and the Republic of France, concluded on the 30th of April, 1803; that they were not claims growing out of the acts of France allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain, concluded on the 22d day of February, 1819; and they were not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th of July, 1831.

CONCLUSIONS OF LAW

The court finds as conclusions of law that said seizure and condemnation were illegal, and the owners and insurers had valid claims therefor upon the French Government prior to the ratification of the

convention between the United States and the French Republic, concluded the 30th day of September, 1800, and were entitled to the following sums to wit:

Payson & Holbrook, owners of vessel and cargo, after deducting insurance, \$6,302.

Benjamin Homer, Daniel Denison Rogers, and David Greene, represented by Charles Francis Adams, Jr., administrator of Peter Chardon Brooks, each \$500.

Crowell Hatch, represented by Henry W. Blagge and Susan B. Samuels, \$1,000.

Jeffrey & Russell, represented by Charles F. Hunt, \$1,000.

Thomas English, represented by Ebenezer Gay, \$500.

Tuthill Hubbard and William Smith, represented by Charles Francis Adams, Jr., administrator of Peter Chardon Brooks, \$1,000 each.

Tuthill Hubbard, in case No. 252, represented by Charles Francis Adams, Jr., administrator of Peter Chardon Brooks, \$500, the same being the amounts of insurance paid by them respectively.

That said claims were relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which in our judgment affect the liability of the United States therefor are set forth in the opinions of this court delivered May 17 and 24 and December 6, 1886.

The Schooner *Little Pegg*

No. 155. Francis King Carey, administrator of Samuel Hollingsworth.

FINDINGS OF FACT

This case was heard before the Court of Claims May, 1886.

The claimant was represented by William E. Earle, Esq., and John & David Stewart, Esqrs., and the defendants by Benjamin Wilson Esq., assistant attorney. After hearing the parties, their proofs and arguments, the court from the evidence finds the facts to be as follows:

I. In 1798, Thomas and Samuel Hollingsworth, of whom Samuel was the survivor, citizens of Baltimore and of the United States, were the owners of the schooner *Little Pegg*, a duly registered vessel of the United States.

II. In the same year said vessel sailed upon a lawful voyage from Baltimore, Md., to Kingston, Jamaica, under the command of William Auld, master, laden with a cargo of flour, crackers, peas, and shingles, all belonging to said owners. September 28, 1798, the vessel was captured by a French privateer, called *Le Macanda*, commanded by Lewis Duprat, and carried into Port au Paix. Said vessel and her cargo were subsequently condemned, to wit, October 3, 1799, as prize, at Cape François, by the French prize tribunal.

III. William Auld, the said master, was born in Scotland, but was naturalized as a citizen of the United States August 22, 1798, and had been a resident of Baltimore since January, 1795. The condemnation of the vessel and cargo was made on the ground that the master was a native of Scotland, with which country France was at war.

IV. At the time of the capture said vessel was worth \$2,000, the cargo \$2,760.50, and the freight \$1,200, making in all \$5,960.50. The claim has never been assigned. The claimant is the duly appointed administrator *de bonis non* of the estate of Samuel Hollingsworth, deceased, by the orphans' court of Baltimore.

V. This claim was not embraced in the convention between the United States and the Republic of France concluded on the 13th day of April, 1803; that it was not a claim growing out of the acts of France, allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain, concluded on the 22d day of February, 1819; and that it was not allowed, in whole or in part, under the provisions of the treaty between the United States and France, concluded on the 4th day of July, 1831.

CONCLUSIONS OF LAW

The court finds as conclusion of law that Samuel Hollingsworth has a valid claim to indemnity upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and was entitled to the sum of \$5,960.50, and that the claim was relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which in our judgment affect the liability of the United States therefor are set forth in the opinion of this court delivered the 17th and 24th of May and the 6th of December, 1886.

The Ship *Theresa*

No. 142. R. Stewart Strobel and Henry L. Bruns, administrators of Thomas Stewart.

FINDINGS OF FACT

This case, involving a claim under the act of January 20, 1885, was heard before the Court of Claims in May, 1886. The claimant was represented by William E. Earle, Esq., and the defendants by Hon. Benjamin Wilson, assistant attorney. After hearing the parties, their proofs and arguments, the court from the evidence finds the facts to be as follows:

I. In 1797 Thomas Stewart, a citizen of Charleston, S. C., was the owner of the ship *Theresa*. The *Theresa* was duly registered as a vessel of the United States. In the same year, under the command of James Brown, the master, she sailed, in ballast, upon a lawful voyage from London to Nantes, where she was to take in a cargo of salt. She bore a letter from Mr. King, the United States minister to Great Britain, to P. F. Dorbee, vice-consul of the United States at Nantes. Arriving at Nantes she was seized by the French marine officers, and, on April 25, 1798, condemned by the tribunal of commerce, whereby she became lost to the owner.

II. The *Theresa* was condemned "upon the plea of the want of a muster-roll or *rôle d'équipage*." The legality of condemnation for this cause, the liability of France to make restitution, and the transfer of such liability to the United States by the operation of the treaty of 1800, were considered by the court and ruled upon adversely to the defendants in the case of *William Gray, Administrator, v. The United States*, No. 7 of these claims.

III. The value of the *Theresa* was \$6,350. The claim has never been assigned, nor is it embraced in the convention between the United States and the French Republic concluded on the 30th day of April, 1803; nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain, concluded on the 22d day of February, 1819; nor to such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the 4th day of July, 1831.

IV. The claimants were duly appointed administrators *de bonis non*

of the estate of Thomas Stewart, deceased, by the probate court of Charleston County, S. C.

CONCLUSIONS OF LAW

The court finds as conclusion of law that the said Thomas Stewart had a valid claim to indemnity upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and was entitled to the following sum of \$6,350, and that the claim was relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States.

The conclusions of law which in our judgment affect the liability of the United States therefor are set forth in the opinions of this court delivered the 17th and 24th of May and the 6th of December, 1886.

The questions submitted by the counsel for the defendants on the present motion were the following:

1. Whether the ship's paper called a *rôle d'équipage*, or muster roll, or crew list, was properly exacted of the original claimants by the French admiralty courts.
2. Whether the original claimants were excused from an exhaustion of their remedies against the privateer owners in France.
3. The question of the conclusiveness against the original claimants of the admiralty condemnations in France.
4. Whether there was war between France and the United States at the time these claims arose, and how that fact affected their validity.
5. Whether the French Government ever admitted the validity of the present claims.
6. Whether this Government bargained away and appropriated the present claims while pending against France.

Mr. Solicitor-General Jenks, for the defendants, requested the court to find the following conclusions of law:

1. That the act of the 20th of January, 1885, submits to this court two questions for its consideration and report: (*a*) The validity of the claims presented as against France. (*b*) Such facts and conclusions of law as may affect the liability of the United States therefor. (23 Stat. L. 283, § 1, 3.)

2. That the court, in its report and conclusions of law, is required to conform to the rules of law, municipal and international, and the treaties of the United States applicable to the case. (23 Stat. L. 283, § 3.)

3. That the acts of Congress of the United States, unrepealed, within the limits of the Constitution, are conclusively obligatory upon this court as law in this case.

4. That this court is not empowered under the law to go behind an act of Congress, unrepealed, to inquire into the motives, reasons, or facts which induced the passage of the act, and pass upon the verity or sufficiency of the facts, motives, or reasons which occasioned the legislative power to pass it, or decide, because it may differ with the legislative power as to the verity of the facts and the sufficiency of the reasons, therefore the act regularly passed, approved, unrepealed, and within the limits of the Constitution, is not law. (*Osborne v. U. S.*, 7 Wheaton, 866; *Fisher v. Blight*, 2 Cranch, 390; *U. S. v. Wiltberger*, 5 Wheaton, 95, 105.)

5. It is a prerogative of sovereignty to judge and determine conclusively whether war is justifiable; and when a sovereign so determines it is conclusive on the whole world. (Story on the Constitution, § 207.)

6. France, at the time of the seizure of the property for which claim is made, was a sovereign nation, and, as such, had a right to determine conclusively as to the United States whether her status should be that of peace or war; and if the latter, whether it should be general or limited; and, in either event, the principles of international law applicable to the status she selected are those which should control in determining her liability for the property for which claim is made. (*The Charming Betsy*, 2 Cranch, 118; 1 *id.* 28–39; 3 Wheaton, 315.)

7. That the deliberate act of France by which she authorized the seizure by force, the condemnation, and confiscation of the merchantmen and armed vessels of the United States, under which the property claimed in this case was seized, was the actual assertion and exercise of a belligerent power, and, as such, constituted a maritime war on her part against the United States. (*Bas v. Tingy*, 4 Dall. 39, 40, 41; *Dana's Wheaton*, § 291.)

8. That the right to redress by the United States or her citizens for the seizure of the property claimed should be determined by the principles of international law, as applicable to a nation engaged in a maritime war. (*Talbot v. Seeman*, 1 Cranch, 28.)

9. That during the existence of a maritime war, if a vessel and cargo of a citizen be seized by one of the belligerents, and be not recaptured by one of his own nation, his title is gone; and, unless by the treaty which terminates the war the rights are reserved, or indemnity is provided for or received for the seizure, he has no valid claim for his loss. (*Vattel's Law of Nations*, 385, 386; 2 Blackstone, 400; 8 Cranch, 145.)

10. The determination as to whether war is justifiable and exists belongs, under the United States Government, to the political departments of the Government, and their determination is conclusive as law on the judiciary. (2 Black, 670; 12 Wall. 702; 15 *id.* 560, 561.)

11. If the political departments of the Government enact such laws, make such proclamations, as authorize the forcible capture of the property of another nation on the high seas, make conquests, and condemn the property captured as booty, it is a political determination of the existence of war. (Prize Cases, 2 Black, 670; 12 Wall. 702; 15 *id.* 560.)

12. The act of Congress of the 9th of July, 1798, and other similar acts, at and about the same time, in pursuance thereof, followed by the capture and condemnation of the property of the French, and other warlike acts of retaliation by force, is a conclusive determination by the political departments of the Government that war existed by the United States against France. (*Bas. v. Tingy*, 4 Dall. 42, 43, 44, 46; 1 Cranch, 28, 31.)

The syllabus in *Bas v. Tingy* is as follows:

Under the seventh section of the *Act of March 2, 1799* (1 Stat. L. 716), France was to be deemed an enemy of the United States in March, 1799, and a French privateer having captured an American vessel, a public armed vessel of the United States was entitled to salvage or recapture.

The opinion declares as follows:

The decision of this question must depend upon another, which is whether, at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between the two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective Governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of

the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war where the Government restrain the general power.

Now, if this be the true definition of war, let us see what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army, stopped all intercourse with France, dissolved our treaty, built and equipped ships of war and commissioned private armed ships; enjoining the former and authorizing the latter to defend themselves against the armed ships of France; to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession.

What, then, is the evidence of legislative will? In fact and in law we are at war. An American vessel fighting with a French vessel to subdue and make her prize is fighting with an enemy, accurately and technically speaking; and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of prizes, which can only be of property taken at sea from an enemy, *jure belli*; and the ninth section speaks of prizes taken from an enemy, in so many words, alluding to prizes which had been previously taken. But no prize could have been then taken except from France; prizes taken from France were, therefore, taken from the enemy. This, then, is a legislative interpretation of the word enemy; and if the enemy as to prizes, surely they preserve the same character as to recaptures. Besides, it may be fairly asked, Why should the rate of salvage be different in such a war as the present from the salvage in a war more solemn and general. And it must be recollected that the occasion of making the law of March, 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property retaken was placed, a circumstance for which the former salvage law had not provided.

The two laws, on the whole, can not be rendered consistent unless the court could wink so hard as not to see and know, that in fact in the view of Congress, and to every intent and purpose, the possession by a French armed vessel of an American vessel was the possession of an enemy, and, therefore, in my opinion, the decree of the Circuit Court ought to be affirmed.

But by the acts of Congress an American vessel is authorized: 1st. To resist the search of a French public vessel; 2d. To capture any vessel that should attempt by force to compel submission to a search; 3d. To recapture any American vessel seized by a French vessel; and 4th. To capture any French armed vessel wherever found on the high seas.

An imperfect war, or a war as to certain objects and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country. It is war *quoad hoc*. As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war, a war at sea as to certain purposes. The national armed vessels of France attack and capture the national armed vessels of the United States; and the national armed vessels are expressly authorized and directed to attack, subdue, and take the national armed vessels of France, and also to recapture American vessels.

Now, is that the truth or is it false? Is that law to this court or is it not law; and was not that a capture exactly like this of the *Sally*? But if it were a war and the laws of war apply, there was no title, no right of recovery whatever left in the owner of the *Sally* twenty-four hours after she was taken under general international law. Under our statute there was none at all, unless on recapture. The same view is expressed in another form by each and every justice in that cause. Now, if you will take that case and make any possible distinction between the case of *Bas v. Tingy* and this case at bar, it is more than I am capable of making on principle, because you will have to find it was captured just as the *Sally* was.

13. The United States having elected to redress the wrongs France had done her and her citizens by retaliation—a warlike measure—and having actually obtained redress in that way, can not afterwards, in the absence of treaty stipulations, deny the justice of the judgment in this last and highest tribunal of nations, nor claim another remedy and payment for the same wrong. (Treaty of 1800, Rev. Stat., § 225; Vattel, 437, 438.)

14. The claim in this case, if any existed, having then been redressed by the war measures of retaliation as against France, is barred by the redress received in the judgment of that court of last resort.

15. When a sovereign appeals to the judgment of the tribunal of war, that appeal is final and conclusive as to the parties in the controversy and all their citizens as to the subject-matter of the dispute, and is conclusively presumed to be fully executed in the treaty by which the appeal is terminated.

16. That by the treaty of 1800 as ratified, no rights of the citizen were reserved, nor any indemnity provided for or received; but both the United States and France expressly renounced their respective pretensions to indemnity for past alleged wrongs committed by either. (Rev. Stat., § 232.)

17. That the very cause of the warlike measures determined upon by the United States as against France, which was terminated by the treaty of 1800, was the capture, condemnation, and destruction by the French of American vessels and cargoes, in which was included the property claimed by the petitioner in this case. (Rawle on the Constitution, 109.)

18. That under the law and facts of this case, the claimant had no right, at, immediately before, or after the treaty of 1800 to indemnity for his claim against France.

19. A nation, by the compact of Government, does not insure against nor agree to indemnify its citizens for all wrongs done them, either individual or national. (Vattel, 402, 403.)

20. The fact that the United States did not require an indemnity of France for the spoiliations committed on the commerce of her citizens does not impose on the United States the legal duty of paying all or any claims for which she as a sovereign did not see fit to demand indemnity.

21. That the judgment of the political departments of the Government in making and ratifying the treaty of 1800 being a political act, and within the jurisdiction of the political departments, is, as law, conclusive on this court; and this court is not empowered to reopen the justice or expedience of the treaty, nor to rejudge it on any grounds. (*Williams v. Suffolk Insurance Co.*, 13 Pet. 420; *Phillips v. Payne*, 92 U. S. 132. *The Amiable Isabella*, 6 Wheat. 72.)

22. That by the act of Congress of the 7th of July, 1798 (1 Stat. L., p. 578), the treaty of 1778 between the United States and France was

annulled, and France, after the passage of the act, had no lawful claim against the United States for or on account of that treaty, or for or on account of any breach or infringement thereof. (1 Stat. L. 538; Rawle on the Constitution, 109; *Chirac v. Chirac*, 2 Wheat. 272; *The Charming Betsy*, 2 Cranch, 118.)

23. That under the law and treaties in this case no claim of France against the United States for any breach or infraction of the treaty of 1778 was paid by set-off, defalcation, or compromise of any rights, if such existed, which this claimant had against France for spoliation.

24. That at the time negotiations for the treaty of 1800 were had between the United States and France, no treaty existed between them, nor any treaty obligation.

25. The United States, by the treaty of 1800, did not receive, reserve, nor stipulate for any additional redress for the alleged wrong claimed in the case of the petitioner; but, upon its ratification, expressly renounced its pretensions of claim therefor. (Rev. Stat., 43d Cong., Post Roads and Treaties, p. 232.)

26. That the claimant in this case has no legal claim or right against the United States.

Mr. B. Wilson, for the defendants, proposed the following additional requests:

1. That international law concerning neutral commerce required, as proofs of the neutrality of a vessel, the same proofs which are mentioned in the treaty of 1778, which are, 1st, the certificate of the several particulars of the cargo (Ordinance of 1681; Chitty's Com. Law, 487; DeMartens' Armateurs, § 21); 2d, a passport (Chitty's Com. Law, 487); Ordinance of 1681; 3 Phillimore Int. Law, 734, cases there cited); 3d, the certificate of the ownership of the vessel (regulation of the Hanseatic League, 1369); 4th, the report or *procès-verbal* of the captain of what was done during the voyage (Boucher Droits Maritimes, §§ 368, 498; Emérigon, sec. tom. 1, fol. 276); 5th, the carrying of the flag of the country to which the vessel belongs (1 Rob. Adm. Rep. 1, 19, 161); 6th, the *rôle d'équipage* (Règlements of 1704, 1774, 1778; Chitty's Com. Law, 487; Valin, Traité des Prises, etc.).

2. That the treaty of 1778, so far as the proofs of neutrality or innocence were concerned, was therefore declaratory of international law already existing and to be interpreted accordingly.

3. That the treaty required a *rôle d'équipage*, or list of the crew,

giving the names and places of birth of the crew and of all who should embark on board, duly authenticated by the officers of the Government.

4. That the object of such a list, not being stated in the treaty, is to be sought for in international law, and is there declared to be to prove the neutrality of the crew. (DeMartens' *Armateurs*, § 21; Chitty's *Com. Law*, 487.)

5. That the Government of the United States having failed and refused to live up to the offensive and defensive alliance (treaty of 1778) existing between it and France, and proclaimed itself neutral, it was competent for the French Government to recognize us as neutrals, and thereafter legal for the French courts to treat our vessels as those of neutrals were to be treated under international law, and no longer as those of allies, disregarding anything in the treaties arising out of the favored position of allies.

6. That when the vessel of a belligerent captured any suspected vessel, the question of prize belongs exclusively to the jurisdiction of the courts of the captor's country. (9 Cranch, 359; 1 Wheat. 238; 2 Gallison, 29.)

7. That where there is probable cause of capture, *i. e.*, circumstances to warrant a reasonable suspicion of illegal conduct, the captors are justified and exonerated from all losses and damages sustained by reason of the capture, and the burden of proof is on the captured. (*The Rover*, 2 Gallison, 240; *Maissonnaire v. Keating*, 2 Gallison, 336; *The George*, 1 Mason, 24; *Shattuck v. Maley*, 1 Wash. C. C. 248.)

8. In the prize court the *onus probandi* rests on the captured. (*The Amiable Isabella*, 6 Wheat. 77; 3 Phillimore *Int. Law*, 723; 8 Cranch, 155.)

9. That as the neutrality or innocence of the property of the claimant was not proven beyond a reasonable doubt, it was rightly condemned. (*Id.*)

10. That municipal laws to enforce a nation's rights under international law are *facts* of the relations of two nations, and *acts* performed by a nation, of which the prize court takes notice in order to enforce international law as applicable thereto; that this was done in the cases of the present claimants, and the condemnation of this property was not rendered illegal by such procedure.

11. That claimants had no valid claim against France, for the reason, among others, that they did not exhaust their remedies in the French

courts by appeal or action upon the bond and against the property of the captor.

12. That not to appeal from the decision of the inferior court condemning the claimant's vessel was an acknowledgment of the justice of the sentence and conclusive. (Lee on Captures, 220.)

13. It is universally admitted that the decree of a prize court is conclusive against all the world as to all matters decided and within its jurisdiction. (17 Otto, p. 80, authorities there cited; note, *Cushing v. Laird*. See also Article 5, French and United States Treaty, 1803.)

14. That it is contrary to public policy to ask a nation to reprobate the long-continued conduct of its political department. (Ellsworth, Ch. J., quoted below; also Vattel, bk. 2, ch. 7, § 85.)

15. That the capture of claimant's property was an act of war, and as such gave rise to no valid claim for indemnity. (Vattel, bk. 3, ch. 13, § 190; 1 Rob. Adm. Rep. 581; 3 Dallas, 226, 227, etc.)

16. That to render a war lawful, and legalize the damage done in the course of it, no declaration is necessary. (Bynkershoek on the Law of War, ch. 2; Grotius, lib. 3, ch. 3, § 6, notes 1 and 2.)

17. That when a state authorizes reprisals for national injury to be made by an indiscriminate seizure of the property of the subjects of another, this order is equivalent to a declaration of war. (Dana's Wheaton, § 291.)

18. That in recognizing that France was at war against us we recognized that the laws of war were applicable to her proceedings, and were estopped to claim that they were piratical. (1 Stat. L., act of July 9, 1798; *Bas v. Tingy*, 4 Dallas, 38; 1 Cranch, 1.)

19. That the political departments of the Government having recognized that France was at war in respect of the seizures of our vessels, the courts can not consider as piratical those acts of hostility which were so directed against our vessels. (*U. S. v. Palmer*, 6 Wheaton, 634.)

20. That the confiscation of enemy's vessels and cargoes is lawful under the law of nations, and rests upon the sound discretion of the national sovereign. (8 Cranch, 145.)

21. That the property of the subjects of one nation may be confiscated by another, after a failure to satisfy for an injury and without a war. (Vattel, bk. 2, ch. 18, § 342; Dana's Wheaton, § 290; Klüber, *Droits des Gens*, § 234, note C; Burlamaqui, *Droits des Gens*, pt. 4, ch. 3, § 42.)

Mr. William E. Earle, having participated in the original argument for claimants and filed printed briefs, submitted the following propositions:

I. That certain claims of American citizens have been released to France. This we established by the treaty of 1800, and by the correspondence and negotiations relative thereto, as officially published in Ex. Doc. 102, 1st sess., 19th Cong.

II. That these claims for indemnity were valid against France, and that her liability for them was admitted by France. This we have established by well settled principles of the law of nations and the treaties between the two nations, and the evidence in Ex. Doc. 102.

III. That the United States released to France these claims of American citizens "for a valuable consideration for the public benefit," ignoring the rights of individual citizens who had suffered by the spoliations. This we have established by the treaty of 1800, and the correspondence and negotiations as to it, as published in Ex. Doc. 102, and the proceedings of the two nations as to its ratification.

IV. That the release by France, of her claims for indemnity, for the failure to keep the treaties of 1778, and for making the Jay treaty, in 1794, was to the United States a "valuable consideration," for their release to France of these claims of their citizens against her. This we have established by the official correspondence published in Ex. Doc. 102, and the treaties of 1778, and well recognized principles of the law of nations.

V. That whilst prize courts may hold themselves bound to administer the local laws and regulations of their own country, and whilst their own decrees are final as to property in *the res*, yet their judgment is the act of their government, and a valid diplomatic claim rests upon it, if the condemnation is in derogation of the law of nations or impairs a treaty. This we have established by decisions of our Supreme Court, and by the settled law of nations.

VI. That in the treaty of 1800, the governments of the two countries came together in an adjustment of their differences or "misunderstanding," as on the basis of the continued existence of the treaties of 1778, and agreed "to negotiate further" as to those treaties and the mutual claims for indemnity for their mutual violations of them; and subsequently, in its ratification, the United States secured a release from the future obligations of the treaties of 1778 and their liabilities for having failed to observe them, in con-

sideration of a release to France of their claims for reclamation of American citizens. The bargain was not only a set-off of the mutual claims to indemnity, but a release to the United States from these treaties for the future.

VII. That war leaves the right to captured property with the possessor at the time of the signing of the treaty; but in view of the fact that there had been no war, this treaty mutually restored all captures on hand.

VIII. That the question arises as to what cases come within the class of those released to France, in the bargain effected by the rescission of the second article, and were therefore valid claims against France, and not excluded by the terms of the exceptions relating to the three other treaties, as declared in the terms of the jurisdictional act, referring these claims to this court. And the answer to this is, all "for illegal captures, detentions, seizures, condemnations, and confiscations, made prior to July 31, 1801," which do not come within one of the three exceptions of the jurisdictional act, and which were made in violation of the treaties between France and the United States, and in violation of the law of nations. And this answer must be applied to the state of facts established by the evidence in each particular case.

IX. That most of these condemnations were based on the want of a *rôle d'équipage*, which was required by the ancient maritime regulations of France, and this regulation was reenacted after the treaties of 1778. The civil tribunals on appeal from the tribunals of commerce, held that this regulation was binding on the courts of France without regard either to the treaties or to the laws of nations. These condemnations, we maintain, were not only in violation of the treaty but of the law of nations.

X. That condemnations because the captain or mate was foreign-born, though a naturalized American citizen, were in violation of the law of nations.

XI. That condemnations for running a blockade were unlawful, for it is a well-established historical fact that the French had not a blockade in the West Indies, and the very proclamations of blockade themselves, show that they were *brutum fulmen* and mere pretexts for making captures.

XII. That the few remaining captures were on the ground of carrying British productions or trading to British ports, both whereof are indisputably in violation of the treaty and are in contravention of the law of nations.

XIII. An illegal condemnation by a prize court is the act of the government of that court, and the valid basis of a diplomatic claim.

Mr. William Gray, Mr. George S. Boutwell, Mr. Edward Lander, Mr. Lawrence Lewis, Jr., Mr. Samuel Shellabarger, Mr. Jere Wilson and Mr. Leonard Myers were also heard in support of the position taken by the claimants.

Argument of *Mr. B. Wilson* for the defendants:

The third section of the jurisdictional act January 20, 1885, provides that this court "shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor."

By the sixth section it is provided that such finding and report shall be only advisory.

Congress wants no information from the court, but positive fact and positive law, and when the court finds such a thing is the fact and such a principle is the established law, and so report to Congress, that body proposes to take action according to its own wisdom upon the report so made. For example, the Supreme Court, interpreting the acts of the political department, have settled the question as to war in all its bearings, and the law to be that it was such a war as authorized captures and condemnations as prize and made one government the enemy of the other. (4 Dallas, 38; 1 Cranch, pp. 1-9, 31, 32, 39, 40, 41.) What more can be done but to report accordingly? Again, the Supreme Court (*Ware, Administrator, v. Hylton, et al.*, 3 Dallas, 258, 1796) have settled the law of nations to be that treaties between sovereign powers when broken by one are voidable at the option of the other; and in *Chirac v. Chirac*, the same court, Marshall, Ch. J., delivering the opinion, held that in 1799 no treaty was in existence between France and the United States. (2 Wheaton, 272.)

What can be done by this court but report that such is the law on that subject? In the same manner, by reference to standard authorities, should all other legal principles be ascertained and reported, as, for example, the *conclusiveness* of prize adjudications (*Cushing v. Laird*, 107 U. S. 69), and *invalidity in law* of claims, based

either upon such adjudications (Lord Eldon in 2 Swanston, 576) or upon acts of war, and the necessity of *exhausting* remedies in the courts in such cases (other than *prize* cases, however), where valid claims *may* exist. All these things are settled *law*, and operate favorably to the United States in this matter. Special exemptions from the general law must be specially pleaded and proven. For example, if some of the captured were prevented from exhausting their remedies, and it appears that all were not, it is incumbent on each claimant to show that he was so prevented. The burden must be on some one to show it, and he who asserts a fact must prove it, and not he who denies it prove the negative. Most, practically all these claims would be invalid for want of exhaustion of remedies, if not already invalid because prize judgments are conclusive and final.

The facts to be reported are, of course, the when and how, where and why, seizures and captures were made by the French. These being found, then the question of law arises, were they illegally made? Were they made in pursuance of international law? It is not pretended that they were made without authority of French law. But it is pretended that France had no right under the law of nations to pass such laws. If this was pretended of the laws of Congress in 1798 authorizing condemnation of French property we should call the pretense an absurdity. However, were the laws illegal according to international law? Upon what alleged right of France were they based? Evidently on the right, which every nation has, of using force to retaliate upon another nation which she believes to have deprived her of her rights secured by treaty, and to have wronged her otherwise. Was this using of force by France for such a purpose legal or illegal? Vattel and Grotius, and other writers on the law of nations, tell us that such laws are proper, and that it is for every sovereign nation to decide for itself when they ought to be passed, not because might is right, but because there is nobody else to decide the question. If the law is right and proper, was it legal to enforce it in the courts? To ask such a question is to answer it. The right of a sovereign to enact such laws is as well settled as any international question can be.

When the commander of a French vessel captured an American vessel there was only one legal way to determine whether he had legally captured her, and whether she was *lawful* prize under the treaties and the law of nations, and that was by trial in a prize court

of the captor's country; so says the law of nations. That trial and the finding were not only legal, but the only legal ones possible. Any other trial and a finding, in any other kind of court, in any other country, would have been illegal, but not this. This is another conclusion of the law of nations which affects the liability of the Government of the United States when subrogated to the liability of France. Prize judgments are not disregarded by international commissions created by the *consent* of nations, because they are, properly speaking, illegal, but for reasons of diplomacy and compromise. For example, the Alabama Commission, as one of the opposite counsel stated, disregarded decisions of the Supreme Court in prize cases. The reports of those Commissioners show that the correctness and legality of the court's decisions were not disputed, but *under the treaty* they were to decide according to *abstract justice* rather than according to *law*. Law works absolute justice in most cases, but fails to do so in the exceptional cases. Nations can *waive* their right to the enforcement of law in such exceptional cases.

This was proposed by American envoys for France to do in 1800, but she refused because we did not agree to her propositions. In the Alabama cases the waiver was agreed upon. That consent could *rightly* have been withheld, and the *law* insisted on, but *policy* induced the contrary. To quote from the argument used in those cases:

It was further maintained on behalf of the claimants that, under the treaty of Washington, the Commissioners were not constituted a tribunal which in prize cases had a merely appellate jurisdiction to review the judgments of the prize court of last resort; that the Commissioners had, by the *terms* of the *treaty*, greater and more absolute power to do justice than was or could be exercised by the prize courts of the United States; and that even if the Commissioners should be satisfied that upon the record presented to the prize court, the facts disclosed *warranted* condemnation under the *law of nations*, yet if they found, under all the circumstances of the case, that in *justice and equity* the claimants were entitled to indemnity, it was their solemn duty to award it, even though it were in the face of the technical rule of the prize courts.

As stated, nations may waive their right under international law, and reach results mutually satisfactory by diplomacy, but diplomacy is not international law.

This can only be done by consent of sovereign nations, and money

paid upon claims thus admitted or *created*, is a gift or donation for purely political and diplomatic reasons (2 Swanston, 576). France did not waive her legal right as to the conclusiveness of the judgments of her prize courts, nor to the necessity for claimants to exhaust their remedy by appeal or otherwise, nor as to the effect of the public maritime war between the two nations. She declined to waive these rights, because we refused to revive without modification the ancient treaties.

As to the alleged admissions and the statements made and omitted in the notes exchanged between the French and American negotiators of the treaty of 1800, embraced between pages 580 and 637, Senate Ex. Doc. 102, 19th Cong., 1st sess., a perusal of those pages with care and anxiety does not reveal either the admissions or omissions relied on by claimants. Neither any waiving of the exhaustion of remedies by France, nor any admission of the validity of the claims, occurs anywhere in that negotiation. The various proposals and counter-proposals, being mere diplomatic chaffering, might explain, but could not alter, what was done. Claims for indemnities due *or* claimed were renounced (that is, as the word means, *withdrawn*), and Congress has asked this court to determine, under international law and the treaties, which were also *law*, whether they were due or not.

The American envoys (Ex. Doc. 102, 19th Cong., 1st sess., p. 587, etc.), admitted the following rights of France under the law of nations by asking her to *waive them*, viz., the conclusiveness of prize judgments (*i. e.*, the exclusiveness of prize jurisdiction in the *capturing* Government), the right to construe for itself the treaty of 1778, as to the *rôle d'équipage* and the right to pass the retaliatory decree of January 18, 1798. The principle of conclusiveness of judgments actually was incorporated in the treaties of 1800 (Art. 4) and 1803 (Art. 5), and the necessity for exhausting remedies into the latter treaty (Art. 4), for payments were to be made in cases "appealed within the time necessary." (See the treaty in French, 8 Stat. L.) The proposition to waive her rights was responded to by France with the proposition that the hostile measures, including the abrogation of treaties, must be *receded from*; for, of course, if the nations did not now agree that they had been at peace, no indemnities would be due for hostile acts. They must first of all settle what their status had been and was now—peace or war. If peace, what had been done that was of a hostile character would thus be adjudged to be illegally and piratically done, and indemnities might be due; but if war, the ravages

of *war* give rise to no indemnities. The two nations, disregarding the unauthorized makeshift reported by their respective agents in the second article, adopted the latter alternative—war, and no indemnities due. It had to be called war or piracy on both sides, and the President and Senate, with the concurrence of France, adjudged that it was not piracy, but war. The Chief Justice, Ellsworth, our principal envoy, had said to the President: "Having given your draft of instructions such perusal as the hurry and pressure of a court crowding two terms into one admits of, I remark, with all the freedom you invite, that to insist that the French Government acknowledge its orders to be piratical, or, which is the same, absolutely to pay for depredations committed under them, is, I believe, unusually degrading, and would probably defeat the negotiation, and *place us in the wrong*." (2 Flanders' Chief Justice, 236.)

One's eyes must be shut to all the rights of France as a sovereign, and all the plainest law of nations, and the decisions of our Supreme Court, not to see the *legality* of the laws passed by France in retaliation for our injuries to her and to force us to fulfill the treaties we had violated and refused to fulfill. The Supreme Court said the nations were in a state of *public war* authorized by *both* Governments. One of its reasons for deciding was, that war and only war, could justify the depredations, confiscations, and bloodshed, on either side, and the honor of both nations required it to be called war. Now, is it not necessary to establish these eight propositions before declaring the condemnation of these ships illegal?

(1) That the treaty did not require the crew-list when it mentioned the crew-list.

(2) That the French court had no right to construe the treaty according to its own understanding of it.

(3) That the French Government had no right to pass the retaliatory decree.

(4) That the French courts had no right to decide whether the French Government had such right under international law.

(5) That the treaty, though violated by us, was still binding in all its details on France.

(6) That the treaty dispensed with all proofs except the passport, which it said *must* be on board.

(7) That the judgments of prize courts are not exclusive and conclusive against all the world.

(8) That there was peace.

Allow all of these eight propositions, and it may be admitted that the condemnation of these vessels was illegal. Deny any *one* of them, and these cases must fall to the ground. It is said by counsel that the decisions of the French courts as to these captures were always against the Americans. Perhaps international law was likewise against them. They were found violating belligerent rights of France. But in no less than three out of the four or five cases exhibited here merely to show the jurisdiction of the court of cassation, the supreme court of error in France, the vessels of these Americans were released. But it is said the inferior tribunals at least always decided against the captured. This is also erroneous, for we have here a list of cases from St. Domingo decided in 1797 and 1799, and out of a little over a hundred captures of suspected vessels there were thirty-three releases. It is in St. Domingo that the French are charged with being most lawless.

In the midst of the most bitter war ever waged between France and England, the English courts never in any case disputed the conclusiveness of French prize judgments. It is true that they decided that neutrals were saved from danger when recaptured from the French; and so said Napoleon; so said our Supreme Court in 1 Cranch, 1. But Napoleon said that the injustice of the French laws, so far as they affected real neutrals, was just retaliation as regarded the Americans, for their Jay treaty, and our Supreme Court, in that very case, decided that France and America were enemies and at war.

The whole world, it is said, are *parties* to an admiralty cause, and, therefore, the whole world *is bound* by the decision. So says Judge Marshall. (9 Cranch, 126.) "These sentences are admissible and *conclusive* between the assured and the underwriters as to *every fact* which they profess to decide." (B. & P. 20.) If a ship is condemned as enemy property, whatever "ordinances" may be referred to, it is conclusive. (5 East. 155.) If the court comes to the conclusion that the vessel is not neutral, it is quite *immaterial* through what media it arrived at it. (Lord Mansfield, 2 Taunton, 85.) If infraction of treaty be the ground, the condemnation is legal and conclusive, although, where a treaty required certain documents on the ship, *municipal laws* were referred to as showing what the treaty required, and although the court "construed the treaty iniquitously." (Lord Ellenborough, 5 East. 99.) If the court, by the aid of the ordinances of its country, reached the conclusion that it was enemy property, it is

conclusive. The sentence is conclusive if based on breach of treaties, however there may not have been such a breach. (*Id.*; Piggott, Foreign Judgments, 258; 4 Cranch, 433.) *Croudson, et al. v. Leonard, Johnson, J.*, delivering the opinion, held: "I am of the opinion that the sentence of condemnation was *conclusive* evidence of the *commission of the offense* for which the vessel was condemned." In 6 Mass. Reports, 277, *John Baxter, et al. v. The New England Marine Insurance Company*, it was held: In an *action upon a policy of insurance*, the sentence of a foreign court of vice-admiralty, condemning the ship insured for a breach of blockade is conclusive evidence of the *fact of such breach of blockade*. (8 Term Rep. 192; *id.* 434; 2 Douglas, 575; 6 Bee's U. S. Rep. 165, affirmed on appeal; 7 Term Rep. 681; 2 Shower, 232; 3 B. & P. 201; *id.* 499; 2 Taunton, 7, 35; 8 Mass. 536.)

The honorable Chief Justice inquired whether all the cases cited as to conclusiveness did not apply to private parties, as distinguished from sovereign nations.

The litigants were private parties in these cases; but Chief Justice Ellsworth and our other envoys claimed no such distinction when they asked the Government of France to waive the principle. The two nations, when they negotiated the treaty of 1800 (Art. 4) and the treaty of 1803 (Art. 5), recognized that the principle applied between nations. We have only to look at the reason for this principle. What is the reason? Harmony, peace, concession to the universal welfare of mankind; that which in our municipal cases is called the policy of the law. It is the policy of the law of nations. If the political department of one nation could erect itself into a court of appeals to reverse the decisions of the supreme court of another nation having by international law jurisdiction of the parties and subject-matter, what litigant could ever be satisfied until his country had become involved in war? (Reference is made on this point to Douglas, 619 and 617, and treaties there cited. Also, to the treaty between Great Britain and Denmark, July 11, 1670, article 37; treaty between Russia and Great Britain, October, 1801, article 2; treaty between Louis XIV and Great Britain, 1677, article 12; treaty between the Netherlands and Charles II of England, 1647, article 12; same parties, 1668, article 16. Also Piggott's Foreign Judgments, 249; Vattel, b. 2, ch. 7, § 85; 9 Cranch, 126; *Campbell v. Mullett*, 2 Swanston, 576, 577, 578, 579, 584, 585; also, article 5, treaty of the United States and France, 1803.)

The treaties referred to recognize that the jurisdiction of prize belongs exclusively and finally to the capturing Government. For instance: "If the King of France shall complain of the unjustness of sentences which have been given concerning the ships or merchandise taken at sea (or of the wrong interpretation of the treaty by the courts), the King of Great Britain shall forthwith commission under his great seal nine of his privy counsel to adjudge such matters and to confirm or revoke these sentences." So we see that according to the theory of these treaties unless the Government of the captor does not choose to reverse the decision of his own courts their decisions stand conclusive against the other nations. Such is the law of nations as to prize judgments. This does not prevent a nation from claiming anything it may desire or another nation from granting what is claimed if it sees fit.

DAVIS, J., delivered the opinion of the court:

This case, with others like it, was fully argued at the last term, and after careful study and industrious conference an opinion was delivered upon the general principles applicable to the claims as a class, while final and detailed findings were delayed, at the defendants' request, until after the summer recess. During this recess the law officers of the Government, diligently and jealously guarding the interests intrusted to them, have carefully studied not only the facts of the several cases, but have reexamined the general principles applicable to the claims as a class—principles understood to have been finally settled, so far as this court is concerned, by the former decisions.

The defendants now move for a rehearing, and somewhat contrary to the usual practice, but in furtherance of the substantial ends of justice, a full, able, and learned argument, occupying nearly two weeks, has been had, in which all the questions heretofore considered have again been exhaustively discussed. Thus, upon a motion for permission to reargue the case, it has in fact been reargued, and in deciding the motion we act with all the light we should have received had the more technical course been pursued of first allowing the motion and then hearing the reargument.

The learned Solicitor-General, who has personally appeared with the assistant attorney of the United States who so competently conducted the defense of these claims, takes as the text of his argument certain suggested conclusions of law, twenty-five in number, many of

which may be readily admitted, either standing alone or in the connection in which they are used, without leading to a result different from that already reached by this court; while considered as a whole they form the successive links of a chain of argument which, if perfect, defeats all the claims submitted under the act of Congress.

Many of the difficulties surrounding these cases will disappear under the touchstone of the jurisdictional act, for it must always be remembered that we are not now to decide in accordance with the general statutes giving us exclusive jurisdiction of actions between the citizen and his Government founded on contract, nor yet under the special jurisdiction conferred by such laws as the "Bowman Act," by which, in aid of Congress, we report facts to that body or its committees, and facts and law to the Executive Departments for their "guidance and action;" nor under the jurisdiction given by Section 1063 of the Revised Statutes, which authorizes us to proceed to final judgment in claims of a certain nature transmitted to us by the heads of the principal Executive Departments. In all these cases we sit as a court bound to administer the law found in the Constitution, statutes, and common law of the United States as interpreted by the Supreme Court, and, so far as we have yet seen, not one of the spoliation claims could have the slightest pretense of a successful result were the investigation to be measured by the standard set for us in other causes. It can not be presumed that Congress, in passing the act of 1885, with full knowledge of the law and facts, intended an empty form; therefore it follows that they desired us not only to examine these claims, but to examine them in the light of some rule different from that upon which we must ordinarily proceed.

The statute says that those citizens or their legal representatives who had "valid claims" of a specified class upon the French Government, arising out of certain illegal acts committed prior to the ratification of the treaty of 1800, may apply to this court (§ 1); we are then to determine the validity and amount of these claims "according to the rules of law, municipal and international, and the treaties of the United States applicable to the same," but we can not enter judgment; on the contrary, after the hearing we may only report to the Congress such conclusions of fact and law as in our opinion may affect the liability of the United States for these claims (§§ 3 and 6), and this report is binding on neither the claimant nor the Congress (§ 6).

The first question presented, then, is as to the validity of the claims against France. This is an international question not within the scope or ordinary judicial inquiry, and is to be measured by rules of law well known, thoroughly recognized, and often enforced, but which in the very nature of things are not, in the absence of special legislative authority, presented to, argued before, or passed upon by the judicial departments of Governments. These rules of law relate to the rights and obligations of nations, not to the title to property, nor to the rights of individuals between themselves, nor yet to the rights of individuals against their own Governments.

While many of the propositions of the defense are in the abstract sound, they rest upon the basis that these claimants are prosecuting a legal right in a court of law acting under the usual common-law restrictions of such a tribunal sitting as a subordinate agent of the State with strictly defined procedure and jurisdiction. So far as power is concerned this court is not so sitting in these cases; "judicial power is the internal or civil branch of executive power exerting itself under such checks and controls as the legislative power has subjected it to" (11 Rutherford, 59); those checks and controls are well defined and well understood, and are such as operate to defeat in judicial tribunals diplomatic claims founded upon international right.

We are for the present, to a limited degree, absolved by express act of the legislature from these checks and controls.

That is, we are to aid the political department of the Government, by its direction, in the disposal of contentions which arise from past international transactions, and while the claims of individuals now before us are not, from a judicial point of view, legal rights—that is, they do not constitute causes of action—they may be none the less rights; that is, they may be founded on law but not enforceable in a court of law.

We do not intend to assume any legislative function or to determine any abstract right, for our power is fixed and defined by the Act of Congress, which authorizes no such course, but which does require something more than a bare opinion that there can be no recovery on these claims in the courts: that was known before the statute was passed, and the legislature have instructed us by that statute to advise them not as to the law enforceable in courts of law, not as to abstract rights, but as to the law enforceable within their own higher jurisdiction.

We have already held that the depredations made by France upon our commerce were illegal, and notwithstanding the able argument of the defense, sustained by the results of most industrious investigation, we do not see reason for changing this conclusion. The quotations in our previous opinion show that the Government of the United States uniformly insisted upon the illegality of the conduct of France and never failed to demand redress; they show that France admitted the principle of the American contention; that Spain paid claims of this class; that England did the same, and that by the principles of the law of nations aside from any definite compact such as that of 1778, the injuries to our commerce afforded good foundation for diplomatic demand. Upon the second branch of the case we held, and in support of the position cited copiously from the contemporaneous negotiations and instructions of the American Secretaries of State, and from the correspondence and journals of the American ministers charged with the protection of American interests, that by the cancellation of the second article of the treaty of 1800 the United States set off the spoliation claims against those claims which France had against us, claims which our representatives thought of so much gravity and of so much value as to authorize an offer, refused by France, of many millions of francs for a release.

It seems unnecessary to repeat those voluminous citations, or to add to them, from the mass of correspondence which we have read, extracts which would be merely cumulative. We have carefully re-examined the question in the light of the reargument, and nevertheless adhere to the conclusions reached last term after exhaustive discussion by counsel and patient and laborious investigation by ourselves, that these claims (as a class) were valid obligations from France to the United States, that the latter surrendered them to France for a valuable consideration benefiting the nation, and that this use of the claims raised an obligation founded upon right, and upon the Constitution (which forbids the taking of private property for public use without compensation), to compensate the individual sufferers for the losses sustained by them.

We do not decide nor have we attempted to decide that the conduct of the Government after the Revolution and prior to the treaty of 1800 was or was not wise, proper, or justifiable, questions which are within the domain of the historian, and have not been submitted to us; we advise, whether in performance of their public duties, and in

protection of the commonwealth, and in carrying out the directions of those having the right to give them, or in fulfillment of the powers and obligations conferred and imposed by the Constitution and laws, the statesmen of that period took such action in relation to private rights as raised an obligation on the part of the Government to compensate the citizen.

We are to see whether the claims urged on France were valid, whether each particular claim brought before us is one of the class defined in the statute, whether it was valid in law against France, and whether the United States became, by their action in 1800 and 1801, liable over to the individual.

The Government again urges that, as there was war between the United States and France, the seizures were justifiable. This point we have so fully discussed in the opinion delivered at the last term that now it seems necessary only to sum up our conclusions and to consider one or two incidental points pressed with particular energy by the defense at this argument.

There were what were called by some "hostilities," by others "differences," by Congress "the system of predatory violence" (1 Stat. L. 578), by Justice Paterson "a qualified state of hostility," "war *quoad hoc*," and by Justice Chase "limited partial war." The executive department said the conduct of France would have justified a declaration of war, but the United States, "desirous of maintaining peace," contented themselves "with preparations for defense and measures calculated to defend their commerce" (Doc. 102, p. 561), while the United States ministers, speaking of the American statutes, wrote that "they did not even authorize reprisals upon [French] merchantmen, but were restricted simply to the giving of safety to their own till a moment should arrive when their sufferings could be heard and redressed."

Congress did not consider war as existing, for every aggressive statute looked to the possibility of war in the future, making no provision for war in the present, and France, our supposed enemy, absolutely denied the existence of war. So then, the legislative, judicial, and executive branches of our Government recognized no war, no public solemn war, as existing, and the opposing party denied the fact.

It has been urged that the compact of 1800 was a treaty of peace; but we do not agree with this contention, for reasons which we give further on, after first considering the subordinate suggestion made in relation to the caption of that treaty as found in print.

Curiously neither of the originals, that supposed to be in the custody of France nor that supposed to be in the Department of State, is obtainable. That belonging to this Government long since disappeared, and we are informed that a like fate has befallen the French copy. We are therefore forced to turn to the copies in print in various compilations of treaties to see what assistance can be obtained from a careful comparison of them. No material difference appears anywhere but in the caption, and there we should expect to find it, as the caption is not part of the treaty, and is usually drawn to suit the taste of the editor. The caption in the Revised Statutes runs as follows:

Convention of peace, commerce, and navigation with France, concluded at Paris, September 30, 1800; ratification advised by Senate, with amendments, February 3, 1801; ratified by President, February 18, 1801; ratified by First Consul of France, with Senate's amendments, etc.

Martens' French collection of treaties contains the head-note, "Convention entre la République Française et les Etats-Unis d'Amérique, signée le 30 Septembre, 1800," and the editor says he had not a copy from the original treaty, but relied upon another publication. Le Clerc has a brief caption containing the word "peace." The caption in the Bancroft Davis edition of treaties entitles the compact a "Convention between the French Republic and the United States of America," and gives the dates of signature, exchange, and proclamation; while the caption in volume 8 of the Statutes at Large, prepared in 1846, runs simply as follows: "Convention between the French Republic and the United States of America." It should be noticed as to this copy that the letter from the committees of Congress found at the beginning of volume 8 states that they "learn that every law and treaty has been carefully collated with the originals in the Department of State."

In Mr. Adams's message, dated December 15, 1800, transmitting the treaty to Congress, the head-note is exactly as in volume 8 of the Statutes (2 F. R. 295).

No inference, therefore, can be drawn from the caption, and the nature of the treaty must be gleaned from its contents, for if it concludes a war that fact will necessarily appear in some form as it does in the treaties of 1783 and 1814 with Great Britain, and in the treaty of 1848 with Mexico. The object of the treaty is stated to be a termination of the "differences" between the two countries, not of the

"war" nor even of the "hostilities" alleged here to have existed between them. Next it should be observed, and this is a vital distinction, that the treaty is of limited duration; it is to be in force for eight years only. Article V speaks of a "misunderstanding"; and in the twenty-seven articles of the agreement, which cover the many different subjects at that time usually found in a treaty of amity and commerce, there is nothing to indicate that in the opinion of the parties there had been a public solemn war or that they were making a treaty of peace.

We are again cited to *Bas v. Tingy* (4 Dallas), a case which we considered very carefully in our previous opinion and from which we made very full quotation, holding that it decided the state of affairs under discussion to constitute partial war limited by the acts of Congress. The opinions of the Supreme Court speak very clearly as to the relations of the nations, but it is well to bear distinctly in mind that the court was dealing not so much with broad principles of international law as with the interpretation of statutes. Tingy claimed salvage for the rescue of the *Eliza* from a French privateer, and this claim he based upon the seventh section of the *Act of March 2, 1799* (1 Stat. L. 716).

The act is entitled "An act for the government of the Navy of the United States," and the seventh section makes provision for salvage to naval vessels for American vessels retaken from France; in construing this statute the court referred to the act of June 13, 1798, as explanatory of the relations between the United States and France. This latter act being "An act to suspend the commercial intercourse between the United States and France, and the dependencies thereof," does not in any way lead to the inference that public solemn war existed, for if such war existed a formal suspension of commercial relations would be unnecessary, and the contents of the statute negative the inference of war especially in the provision that no French vessels "armed or unarmed, commissioned by or for or under the authority of the French Republic, or owned, fitted, hired, or employed by any person resident within the territory of that Republic, or any of the dependencies thereof, or sailing or coming therefrom, excepting any vessel to which the President of the United States shall grant a passport . . . shall be allowed an entry or to remain within the territory of the United States unless driven there by distress of weather or in want of provisions," and these distressed vessels are to be allowed

to provision and refit (§ 3), something certainly not permitted either in time of war or reprisal.

The *Act of June 28, 1798* (1 Stat. L. 574), also considered by the court, was intended as an addition to that of June 13, 1798 (1 Stat. L. 565), and makes provision as to the amount of salvage to be received by American war vessels capturing French armed vessels during what the latter act describes as the "aggressions, depredations, and hostilities" encouraged and maintained "by the Government of France," and which it does not describe as war.

The decision of the Supreme Court therefore goes to this extent and no more, that for the purpose of a recovery of salvage France was an enemy to the extent the acts of Congress prescribed.

It has been urged that the treaty of 1800 was a solemn adjudication of the claims adverse to this Government, but we are of opinion not only that this position is negatived by the treaty itself, but that the negotiations which preceded that contract, and which may very properly be referred to for explanation if there be ambiguity in the document, do not support such a contention. Those negotiations having been commented upon by us heretofore, we need not now repeat them, while as to the expunged second article of the treaty, that upon which this contention hangs, it is sufficient to note the statement that as the ministers were "not able to agree respecting" the treaties of 1778 and 1788, nor upon the indemnities "mutually due and claimed, the parties will negotiate further on these subjects at a convenient time." Meanwhile the treaties are to have no effect and the relations of the countries are to be governed by the treaty of 1800.

The claims made by France, for which the United States offered millions of francs for release, were national, and were based upon the provisions of the treaties of 1778. The claims for indemnity which we had constantly urged, and whose payment Pickering demanded as an ultimatum, were what are known as the "spoliations claims." In the entire negotiation, as we have shown in our former opinions, French claims based upon treaty obligations, past and future, were set up against American claims for illegal seizures, condemnations, and confiscations.

To be sure, Pickering makes a passing mention of national claims on the part of the United States, adding that, as national claims may probably be less definite than those of individuals, and consequently more difficult to adjust, "national claims may on both sides be relin-

quished." (Doc. 102, p. 566.) An examination of the negotiations will show that such claims on our side were not pressed, while on the French side they were strongly urged.

Nowhere is the contention more concisely formulated than in the communication of J. Bonaparte and his colleagues to the American Commissioners, wherein the French ultimata are set forth in this form: "Either the ancient treaties, with the privileges resulting from priority and the stipulation of reciprocal indemnities, or a new treaty assuring equality without indemnity." (Doc. 102, p. 618.)

"At the opening of the negotiations," said the Secretary of State to the American ministers, "you will inform the French ministers that the United States expect from France, as an indispensable condition of the treaty, a stipulation to make to the citizens of the United States full compensation for all losses and damages which they shall have sustained by reason of irregular or illegal captures or condemnations of their vessels and other property under color of authority or commissions from the French Republic or its agents" (Doc. 102, p. 562); and he closed this instruction with several points "to be considered as ultimata," the first of which was: "That an article be inserted for establishing a board, with suitable powers to hear and determine the claims of our citizens for the causes hereinbefore expressed, and binding France to pay or secure payment of the sums which shall be awarded," while the second point prohibited recognition of the old treaties.

There never was a substantial retreat on either side from these absolutely diverse positions, although there was considerable vacillation, until finally, in a spirit of patriotism, the representatives of the United States, abandoning Mr. Pickering's ultimata, consented to leave the question still open, as it is found in the second article of the treaty. That article, in terms, admits that there existed differences as to the treaties of 1778, and in terms it states that indemnities are "mutually due and claimed." If indemnities are mutually "due" and indemnities are mutually "claimed," the instructions and the negotiations prior to the treaty should show what those "due" and "claimed" indemnities are. They do show that upon one side they were claims for national indemnity under treaty obligations; on the other side, claims for indemnity for spoliations. As the treaty states that indemnities are "claimed," and as it states that indemnities are "due," we can not agree that it operates as an adjudication of those claims upon which the indemnities are founded.

The jurisdictional act also negatives this assumption in its direction that we shall examine valid claims arising out of certain acts committed prior to the ratification of the treaty of 1800, thus negating so far as this court is concerned any possible final adjudication by that international agreement. The statute instructs us not to investigate claims now valid against France, or claims which citizens now have against France, but valid claims which citizens "had" against France and which arose out of certain illegal acts committed prior to the treaty's ratification.

By the action of the President and Senate on the one side, and of Napoleon on the other, the second article was expunged from the treaty upon agreement that "the two states renounce the respective pretensions which were its object." Thus, for the purpose of quieting the difficulties and dangers flowing from the treaties of 1778, to avoid the French claims, from which a release had been asked at an offered price of many million francs, to save the young Republic from internal dissension and from danger from without, the American authorities surrendered to France the claims for spoiliations upon which up to that moment they had most steadily and most strenuously insisted.

The alleged reprisals committed by this country upon French commerce were most limited in their nature, and hardly amounted to more than is allowed by the natural law of self-defense—that law which, by not obliging us to part with our lives, our limbs, or our property, allows us to defend our persons and our goods.

The reprisals were authorized and defined by acts of Congress, the first of which was passed in June, 1798, and the last in January, 1799.

The *Act of June 25, 1798* (1 Stat. L. 572), authorized "the defense" of merchant vessels against "French depredations," and to that end permitted the merchantman to oppose search, restraint, or seizure attempted by an armed French vessel, permitted the merchantman to repel by force any assault by such a French vessel, authorized him to capture such an assaulting vessel, and permitted the merchantman to retake any other American merchantman captured by any armed French vessel.

The second section of this act, which provided for salvage, refers to the case of the capture of a French "armed" vessel, from which an assault or other hostility "shall be first made"; and Section 3 requires a bond from armed merchantmen that they shall commit no "unprovoked violence" against the vessel of any nation in amity with the

United States. Finally, the sixth section directs that when France shall stop the "lawless depredations and outrages hitherto encouraged and authorized by that Government against the merchant vessels of the United States, and shall cause the laws of nations to be observed," the President shall instruct the merchantmen to submit to search and to refrain from violence.

As to the next act, passed three days later (1 Stat. L. 574), it is only necessary to note that recaptures were to be restored after salvage paid the recaptors, nothing going to the Treasury. The 9th of July following an act was passed to "protect the commerce of the United States," which authorized the President to give private armed vessels the same license and authority to take armed vessels of France, and to recapture American vessels, as public armed vessels of the United States had by law (1 Stat. L. 578, § 2); "armed" French vessels captured to be absolutely forfeited to the capturing vessel, which should receive also just and reasonable salvage on all recaptures. (§§ 5, 6.)

The license and authority given the public armed vessels of the United States are found in the first section of this act of 9th July, 1798, and also in a prior act entitled "An act more effectually to protect the commerce and coasts of the United States," approved May 28, 1798 (1 Stat. L. 561), which permitted the seizure only of such French armed vessels as had committed, or were hovering on our coasts for the purpose of committing, depredations on vessels belonging to citizens of the United States, and also permitted the recapture of American vessels seized by the French. The act of July went further than this, and authorized the President to instruct the commanders of public armed vessels to "subdue, seize, and take any armed French vessel which shall be found within the jurisdiction of the United States, or elsewhere on the high seas." The authority, therefore, given to armed merchantmen by this statute was to subdue, seize, and take any French "armed" vessel, and to recapture any American vessel.

These statutes seem to us not only defensive in their character, but also marked by self-restraint and calm judgment. Notwithstanding the persistent attacks by France upon the American mercantile marine, no permission is given in this legislation to injure French commerce; armed vessels only are to be seized, and American vessels may be recaptured; peaceable French merchantmen may pursue their voyages unmolested.

A system of reprisals goes further than this, for it is based upon the

principle of compensation, and is aggressive, not defensive, in spirit and intent.

Reprisals [says Vattel, lib. 2, p. 342] are used between nation and nation to do justice to themselves when they can not otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt, to repair an injury, to make a just satisfaction, the other may seize what belongs to it and apply it to its own advantage, till it has obtained what is due for interest and damage, or keep it as a pledge until full satisfaction has been made. In the last case it is rather a stoppage or a seizure than reprisals, but they are frequently confounded in common language.

Dr. Woolsey says reprisals consist in recovering what is our own by force, then in seizing an equivalent. We do not attempt to lay down any general rule of law on this question of reprisals, but a study of the authorities leads to the conclusion that the action is affirmative and aggressive in character, having for its object compensation. The essence of reprisals has been said to be security—that is, the seizure of property for protection until just claims are settled, but we do not see that the principle of compensation is thereby changed, as the seizure of property for security must be directed by an effort to obtain security sufficient in amount to provide compensation should the demand for redress be unsuccessful.

The statutes we have cited have no such object; they are not aggressive in their provisions or in the power they give, but entirely defensive, except in the instance of seizing armed vessels or retaking captured American vessels. The aim of the statute is defense of our merchantmen, not depredations upon the commerce of France, not compensation to the United States for losses already incurred, not security for demands heretofore made, but protection and safety in the future. It seems to us, therefore, that these acts lack the essential elements of statutes of reprisals. Two suggestions occur to us in concluding this point. If there were a state of war or a state of reprisals existing, why should distressed French vessels be allowed to refit and provision in our ports as they were by the express provisions of the *Act of January 30, 1799* (1 Stat. L. 614)? The Government of the United States could not have considered that it was at war, or that a state of reprisals existed, for the instructions of Mr. Pickering, the Secretary of State, and the mouthpiece of the Government, entirely negative such a supposition. (Doc. 102, pp. 561 *et seq.*)

In the face of these statutes the seizure of a merchant vessel can not be justified on the one ground that she was armed; and more especially is this true as to seizures during the period when these claims arose, a period when, to guard against the pirates of the Caribbean, of the Malay Archipelago, or of the Algerine coast, it was customary for merchant vessels to carry some armament.

The laws of neutrality and nations, in no instance that I know of [says Judge B  e, in 1795, while holding the District Court of South Carolina], interdict neutral vessels from going to sea armed and fitted for defensive war. All American Indiamen are armed, and it is necessary they should be so. . . . When the wisdom of Congress substituted an embargo for a declaration of hostilities, preparations of this sort might have been seen in every State in the Union. From the instructions and circular letter to the different collectors, it was clear that the vessels of the belligerent powers alone were comprehended in the restrictions. Even they might arm for defense; and if, as respected French vessels, it should appear doubtful whether their equipment was applicable to war or commerce, such equipment was declared lawful.

Each case before the court must of course be examined separately upon the facts peculiar to it, and it is not impossible that such facts may be shown as to some of the private armed vessels of the United States as justified their seizure and condemnation.

The vessels whose cases are now decided were either unarmed or were armed for strictly defensive purposes.

The jurisdictional act requires us to inquire into illegal condemnations, and it is urged on behalf of the defendants that all condemnations by the French courts are final and conclusive upon this court if the French court had jurisdiction. Many citations are made in support of this contention, among them the case of *Baring and others v. The Royal Exchange Assurance Company* (5 East. 99 *et seq.*), which may be taken as a fair illustration.

The American ship *Rosanna*, insured by the defendants, was captured and condemned by the French, whereupon plaintiffs sued on the policy and recovered. Lord Ellenborough, Ch. J., interrupting the argument, said:

Does not this [French] sentence of condemnation proceed specifically on the ground of infraction of treaty between America

and France in the ship not having those documents with which in the judgment of the French court the American was bound by treaty to be provided? I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously; yet, having competent jurisdiction to construe the treaty, and having professed to do so, we [the court] are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication where the same question arises here upon which the foreign court has decided. After arguing for hours, we must come to the same conclusion at last, that the French court has specifically condemned the vessel for an infraction of treaty which negatives the warranty of neutrality. Then, having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Whenever a case occurs of a condemnation by a foreign court on the ground of *ex parte* ordinances only, without drawing inferences from them to show an infraction of treaty between the nation of the captors and captured, and referring the judgment of the court to the breach of treaty, I shall be glad to hear the case argued, whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality or as positive laws in themselves, binding other nations *proprio vigore*.

The decision of the English court, then, goes to this extent, that in an action between individuals the decree of the French court which had jurisdiction is final; so would it also be final as to the vessel, and the purchaser at the confiscation sale could rest upon the decree as good title against all the world.

But all this does not affect the position of the United States Government against the Government of France.

Lord Ellenborough says that no matter how iniquitous the construction given the treaty by the French court, he, as a judge, is bound to follow it. But so is not the Government of the United States. That Government could have objected either that the court was corrupt, or that there existed no treaty, or that there had been manifest error in construing it. All such questions may be outside the right of a court to consider, but they are within the right and form part of the duty of the political branch of the Government. If the French court, acting within its jurisdiction, construed the treaty iniquitously, the courts might not have power to remedy the wrong, but the owner had a right to appeal to his Government for redress, and that Government, when convinced of the justice of his complaint, was bound to endeavor to redress it.

The decree is an estoppel on the courts, but it is no estoppel on the Government; in fact, the right to diplomatic interference arises only after the decree is rendered. Of course, precedents for cases of this kind are not to be found in the reports of courts, for no such case can, in the nature of things, come before a court unless by virtue of a special and peculiar statute, such as that under which we now act; but diplomatic history is full of them.

Rutherforth (*Institutes*, vol. 2, ch. 9, p. 19), speaking of the right of a state to proceed in prize, says:

This right of a state to which the captors belong to judge exclusively is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations, or to particular treaties, because it has no jurisdiction over them in respect either of their persons or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy, which may consistently with the law of nations give them a remedy either by solemn war or by reprisals. (See Dana's *Wheaton*, 391.)

This brings us naturally to another point, admitted as a general principle, that appeal should be prosecuted to the court of last resort before there can be diplomatic intervention.

The exceedingly able British-American Commission which sat in Washington in 1872 not only unanimously decided that they had jurisdiction in prize cases in which the decision of the ultimate appellate tribunal of the United States had been had, a conclusion in which even the agents of the United States concurred, but also that they had jurisdiction when the claimant had not pursued his remedy to the court of last resort, provided satisfactory reasons were given for the failure to appeal. (Papers relating to the Treaty of Washington, vol. 6, pp. 88-90.) To this last conclusion the American Commissioner dissented; but even he held that a misfeasance or default of the capturing Government, by which means an appeal was prevented, was sufficient to excuse the failure to appeal. (*Id.* 92.)

The rights of the prize courts are the rights of the capturing state. These courts are its agents, deputed by it to examine into the conduct

of its own subjects before becoming answerable for what they have done, and the right ends when their conduct has been thoroughly examined. Therefore the state has a right to require that the captor's acts be examined in all the ways which it has appointed for this purpose, and on this principle is founded the doctrine that the complainant, unless he exhaust his appeal, shall be held to confess the justice of the decision. This presupposes, first, that there are appellate courts; second, that they are open to the complainant freely and honestly. The captor has no right to insist for his own protection upon the fulfillment of a form which he by his own acts prevents.

There is also a distinction, not often clearly drawn, between the validity of a claim *per se* and the right to enforcement. The justice of the claim is founded upon the injustice of the sentence. The appeal does not affect the merits of the claim; it does not palliate or destroy any wrong done; but it is simply a course provided for the captor's protection, that he may fully examine into the acts of his own agents, through his other agents, the courts.

The whole proceeding, from the capture to the condemnation, is a compulsory proceeding *in invitum* by the state in its political capacity, in the exercise of war powers, for which it is responsible, as a body politic, to the state of which the owner of the property is a citizen. (Dana's Wheaton, note, 186.)

Therefore the capturing state may waive such a demand, and not insist upon exhausting its right to further investigation, and may waive it by failing to provide an appellate tribunal, or by preventing recourse to it, or in any other way which shows an intention not to insist upon this right of examination; but appeal or no appeal, the validity of the claim is founded upon the injustice to the claimants.

All writers lay down the principle that appeal should be taken from the inferior to the superior tribunal before resort by the injured Government to measures of redress; but this principle is always coupled with the extreme measures of war and reprisals (see Rutherford, *supra*; Grotius, bk. 3, ch. 2, §§ 4, 5), and there is no assertion in the writers that illegal capture necessarily does not found an international claim even when appeal has not been taken.

It was notorious that justice could not be obtained in the French prize tribunals in existence at the time of those seizures. Mr. Pickering, writing to Mr. Pinckney in April, 1797, said:

The report of Mr. Mountflorenc, which you transmitted, shows that the merchants in the ports of France who constitute the tribunal of commerce in which our captured vessels are tried and, on the most frivolous and shameful pretenses, condemned, are often, if not commonly, owners of the privateers on whose prizes they decide. (Doc. 102, p. 165.)

Consuls were at one time forbidden to appear before the tribunals in defense of absent owners. (*Prises Maritimes*, vol. 2, pp. 317 *et seq.*)

Soon [says Cauchy], upon the occasion of the rupture with England, the signal was given for privateering. The French gave to it all that could encourage speculations half mercantile, half warlike; they put at the disposition of the owners part of the sailors of the fleet, even to strangers and neutrals; they opened to them the storehouses of the state; they abandoned to the captors the total product of the captures, and they joined to that in certain cases premiums and rewards. They did more; they abolished with the offices of the admiralty the tribunal of prizes, and, in order to find judges more ready to sanction captures, they conferred upon the tribunals of commerce and of the district the judgment of these matters.

It was erroneously that they had represented the benefits of privateering as a source of riches and public prosperity. In order to make the fortunes of four or five ports, the privateers were reducing the whole of France, a country by nature agricultural and industrial, so that she had neither raw materials for manufactures nor supplies for her navy, nor outlets for her products, for they kept away from our ports the neutral vessels which could alone supply the total absence of vessels sailing under the French flag.

On the other hand, were not the relations of the Republic with foreign Governments at the mercy of simple judges of commerce or of district, imprudently invested by the law with the terrible right to put France in a state of war against the wish and knowledge of her Government? The Directory concluded that privateering, instead of receiving more extension and favor, ought to be restrained and regulated by law.

But this progress, foreseen under the Directory, was not to be accomplished until after its fall. (*Le Droit Maritime International*, Eugene Cauchy, Paris, 1862, vol. 2, pp. 317, 318, 323-325.)

The council of prizes, which was the supreme court of appeal in prize matters, was abolished in 1793. The 29th Germinal, year IV, the Council of Five Hundred passed a resolution thus expressed: "The appeals from the tribunals of commerce in matters of prize shall be carried to the tribunals of the departments."

. . . Carried to the Council of the Ancients, this resolution was not opposed, and the 8th Floréal, year IV, it was converted into law. One only remembers too well (adds M. Merlin) how disastrous were the results of this strange legislation. The tribunals paid no attention in their decrees to the relation of France with foreign powers, whence arose numerous and pressing claims.

However, to palliate the political inconvenience that might flow from thus vesting ordinary tribunals with the cognizance of maritime prizes, it was thought sufficient to authorize the commissaries near the civil tribunals to refer to the Government those matters which necessitated the interpretation of treaties, and in which the judgments of the tribunals might compromise the rights of a friendly or neutral power; but experience was not long in demonstrating that this palliation was a vain remedy, and that the legislation ought to be deeply modified, the tribunals having shown the greatest hostility against the measure, some determining in spite of it the causes which the commissaries had referred to the Executive Directory; others denying to the commissaries of the Government the right to judge alone of the propriety or necessity of the reference. Matters had come to such a point that in the year VIII the minister of justice, Cambacérès, being instructed by the Consuls as to the amendments to be made to the legislation as to prizes, was authorized to say "that privateering had become a system of brigandage, because the laws which had been applied to it were insufficient and bad; that they had heard complaints raised in all directions by merchants and foreign ministers, and that nevertheless the Government, convinced of the justice of these complaints, had always been without power to do right." (*Traité des Prises maritimes*, par Pistoye et Duverdy, Paris, 1858, vol. 2, pp. 157, 158.)

The form and expense of appeal were useless, for it was not denied that the adjudications below were in accordance with French ordinances, while it was contended that they were in violation of the rights of neutrals, measured either by treaty provision or by the precepts of the law of nations. Municipal law is not a measure of international responsibility, but it is binding within the jurisdiction of the state upon all its subordinate agents, including the courts. The decree in one of the cases before us, which was appealed to the civil tribunal, shows the following as the grounds for affirming the condemnation below:

The tribunal . . . considering the rules of 1704, 1744, 1778, prior as well as subsequent to the treaty between France and the United States of America, emphatically demand that all

foreign ships shall be furnished with a *rôle*, authenticated by the public officers of the neutral port whence they have set out, under pain of being good prize. Considering that the execution of these regulations has been ordered by article 5 of the law of the 14th of February, 1793; considering that a ship, which can not be reputed neutral on account of a lack of papers sufficient to prove its neutrality, can not be regarded but as an enemy, and, being so, its cargo is to be confiscated, according to the terms of article 7 of the ordinance of the marine of 1681—title prize—says that it has been well judged by the judgment which has been appealed from, and orders that it shall have its full and entire effect.

So it appears that questions of treaty or international law were not ruled upon, the court being guided alone by the statutes of France. In the face of precedents of this kind an appeal was a vain and expensive form, as an affirmation of the judgment below necessarily must follow. The cases were class cases, the condemnations (so far as we have yet seen) proceeded upon substantially the same grounds, and one appeal was decisive of all similar cases. The state's right of investigation had therefore, in effect, been satisfied when it had affirmed in one case the legal principles applicable to many others presenting the same facts.

There were appeals also to the court of cassation, which were decided adversely to the claimant—necessarily so decided when the character and duty of the court are understood.

When the jurisdiction of the court of cassation is invoked there must take place a preliminary argument to determine whether the court under the particular facts of the case has or has not jurisdiction. This settled in the affirmative by one of the divisions of the court known as the chamber of requests, the cause is referred either to the chamber of civil causes, or to the chamber of criminal causes, and the jurisdiction of these chambers is simply to secure uniformity in the construction of the statutes. Merlin says:

As resource to the cassation is only an extreme remedy which has no other object than the maintenance of the legislative authority and of the ordinances, it can not be made use of under the simple pretext that a case has been ill-judged in the main.

The opinion of the council of state, dated January 18, 1806, speaking of the court of cassation, says:

If the forms have been violated [below] there is no judgment, properly speaking, and the court of cassation destroys an irregular decree. If, on the contrary, all the forms have been observed, the judgment is reputed to be truth itself. . . . If, then, a decree should be in formal opposition to a written provision of the law, the presumption of its justice disappears, for the law is and ought to be the justice of the tribunals; wherefore the court of cassation has the right to annul in this case the decrees of the courts. (See Merlin, *Répertoire*. . . . *de Jurisprudence*.)

What, then, could be the object of an appeal to the court of cassation when the court below had not misinterpreted the French law, especially as such an appeal would in no event have suspended the execution of the judgment? (Code, art. 16, title, Courts and tribunals (1790), Tripier's edition, 1865.)

The condition of affairs in regard to French courts is well illustrated by the letter from Pinckney, Marshall, and Gerry to the Secretary of State (October 22, 1797, Doc. 102, p. 467), wherein they quote their advocate as saying: "It is obvious that the tribunal have received instructions from the officers of the Government to hasten their decisions, and that it was hardly worth while to plead, for all our petitions in cassation would be rejected."

In the colonies matters were still worse than in France (Tuck's Report, and citations therein, H. R. Ex. Doc. 194, 49th Cong., 1st sess.) and appeals were much more difficult. After the decision of a court, organized in some instances for the purpose of condemnation, by an officer of the Government, himself interested in privateers, or in some instances after a decision by that officer in person (*id.*, p. 9), the only remedy was to obtain an appeal to the mother country. This trouble and expense were practically useless (see in this relation Skipwith to Berlier, Doc. 102, pp. 833, 834). Communication between France and the colonies was difficult; the masters of the seized vessels were poor and were often stripped by the privateers of what little they had.

The condition of French prize tribunals was so notorious as to cause a change in admiralty law, the reasons for which were thus expressed by Lord Stowell:

It has certainly been the practice of this court, lately, to grant salvage on recapture of neutral property out of the hands of the French, and I see no reason at the present moment to depart from it. I know perfectly well that it is not the modern practice of the

law of nations to grant salvage on recapture of neutral vessels, and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him, inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. This proceeds upon the supposition that those tribunals would duly respect the obligations of the law of nations; a presumption which, in the wars of civilized nations, each belligerent is bound to entertain in their respective dealings with neutrals. But it being notorious to all Europe, in the present war, that there has been a constant struggle maintained between the governing powers of France, for the time being, and its maritime tribunals, which should most outrage the rights of neutral property—the one by its decrees, or the other by its decisions—the liberation of neutral property out of their possession has been deemed, not only in the judgment of our courts, but in that of neutrals themselves, a most substantial benefit conferred upon them, in a delivery from danger against which no clearness and innocence of conduct could afford any protection. And a salvage for such service has not only been decreed, but thankfully paid, ever since these wild hostilities have been declared and practiced by France, against all acknowledged principles of the law of nations and of natural justice. When these lawless and irregular practices are shown to have ceased, the rule of paying salvage for the liberation of neutral property must cease likewise.

No proof is offered that the maritime tribunals of France have, in any degree, corrected either the spirit or the form of their proceedings respecting neutral property generally; and, therefore, I shall not think myself authorized to depart from the practice that has been pursued, of awarding a salvage to the captors. (*The Onskan*, 2 Robinson, 300, 301.)

And later he said:

It is certainly true that the standing doctrine of the court has been that neutral property, taken out of the possession of the enemy, is not liable to salvage. It is the doctrine to which the court has invariably adhered till it was forced out of its course by the notorious irregularities of the French cruisers and of the French Government, which proceeded, without any pretense of sanction from the law of nations, to condemn neutral property. On these grounds it was deemed not unreasonable by neutrals themselves that salvage should be paid for a deliverance from French capture. The rule obtained early in the war, and has continued to the present time. It is said that a great alteration

has taken place in the French proceedings, and that we are now to acknowledge a sort of return of "*Saturnia Regna*." This court is not informed, in a satisfactory manner, that any such beneficial change has taken place in the administration of prize law in the tribunals of France; and, therefore, it will continue to make the same decree till the instructions of the superior court shall establish a different rule. (*Eleonora Catharina*, 4 Rob. 157.)

It is important to note that during the period of these seizures neither the Government of the United States, which consistently supported the claimants' contentions, nor the Government of France, from whom we were demanding redress, indicated the necessity of the form of appeal, nor later did the French, even in the long negotiations in which the validity of these claims was a principal subject of discussion, intimate in any way that they considered the appeal of importance or that they required it.

We conclude, therefore, that under these exceptional circumstances a claim properly founded in law is not excluded from our jurisdiction because the supposed remedy by appeal was not exhausted, and this we hold upon two principal grounds: First, that by the action of the French Government such an appeal was useless or impracticable; second, that as between the United States and France such an appeal as a condition precedent to recovery was in effect waived.

The decree condemning the *Industry* proceeds upon the theory that the vessel's *rôle d'équipage* was not in the form said to be required by article 25 of the treaty of February 6, 1778, and also said to be required by certain French decrees declaring to be good and lawful prize every American vessel not having a *rôle* in a form prescribed.

Colloquially a *rôle d'équipage* is usually treated as a crew list, whereas in French law it is a more formal paper, with more extended requirements.

To the first of the propositions contained in the court's decree a very clear answer is found in the fact that the treaty does not demand, as we have already decided, that a crew list of any kind be carried on the vessel. Article 25 of that instrument calls for a "letter or passport expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties;" this passport to follow a form annexed to the treaty. The ship was also to have a certificate

as to cargo, showing she was not carrying contraband; but this certificate is not brought in question in these cases. The treaty therefore required two documents: First, a passport; second, a certificate as to cargo. The form of passport annexed to the treaty runs as follows:

The name of the master and the name, hailing port, and tonnage of the vessel are given, together with the name of the port in which she is lying, as well as that of the port to which she is bound; the general nature of her cargo is described, and it is made known and certified that permission has been given the master to proceed after he shall make oath that the vessel belongs to one or more American citizens.

Up to this point, therefore, the passport's requirement is a description of the vessel and cargo, with the name of the master and a sworn statement as to the citizenship of the owners. Up to this point also the document follows exactly article 25 of the treaty, contains everything demanded by that article, and we are informed that it was the custom of the United States in the English version of the passport to halt at this point, while the versions in foreign languages contained the concluding portion, which we are now about to consider. (See original sea-letter of the *Zebra*; claim allowed under treaty of 1831; original MSS. Department of State.)

The master "will," it says further, keep the marine ordinances on board, in every port he "shall" show his sea-letter, "shall" give a faithful account of his voyage, and "shall" carry the colors of his country; and he shall (or will) enter in the proper office (*remettra*) what:—"a list, signed and witnessed, containing the names and surnames, the places of birth and abode of the crew of his ship and of all who shall embark on board her, whom he shall not take on board without the knowledge and permission of the officers of the marine."

There is no requirement here that the master shall carry on his vessel the document described, be it *rôle d'équipage* or crew list. The demand of this clause is that such a document be deposited or filed (*remis*) in a proper place, and whether this be done before or after the passport issue is not material. That instrument simply declares that such a list has been, or at least will be, before sailing properly filed, not carried. (Doc. 102, pp. 467 and 564; 2 *Prises Maritimes*, 53.)

The provision of Article IX of the treaty of 1788, relating as it

does to consular rights in the arrest of deserting seamen, has no bearing upon this question. A semi-extraterritorial power is by that instrument given to French consular officers, and a way strictly marked out in which they shall pursue it; to arrest a deserter they must show him to be part of the vessel's crew, and this they must do by exhibiting "the registers of the vessel or ship's roll." This is a specific agreement relating to a specific subject, and has no reference to condemnations.

The *Industry* was not condemned because the crew list had not been filed in the home port, but because the *rôle d'équipage* was not in form. The careful study and patient research of Government counsel have failed to develop any treaty requirement that such a document be carried on board the vessel, while the United States Government constantly and most peremptorily insisted that during all the period now under discussion the French demand was illegal and unauthorized by treaty or other law. The Pinckney mission told M. Belamy in October, 1787 (Doc. 102, pp. 466, 467), that none of our vessels had such a *rôle*; and that if they were to surrender the property taken from their fellow-citizens in cases where the vessel was not furnished with such a *rôle* the United States would become responsible for the property so surrendered, as "it would be impossible to undertake to assert that there was any plausibility in the allegation that our treaty required a *rôle d'équipage*."

Pickering's interesting instructions to the Ellsworth mission, dated October 22, 1799 (Doc. 102, p. 561), contain a very definite statement of the position of the Government on this subject. He lays down as—

an indispensable condition of the [proposed] treaty a stipulation to make to the citizens of the United States full compensation for all losses and damages which they shall have sustained by reason of irregular or illegal captures or condemnations of their vessels and other property. And all captures and condemnations are deemed irregular or illegal when contrary to the law of nations generally received and acknowledged in Europe, and to the stipulations in the treaty of amity and commerce of the 6th of February, 1778, fairly and ingenuously interpreted while that treaty remained in force, especially when made and pronounced:

(1) Because the vessel's lading, or any part thereof, consisted of provisions or merchandise coming from England or her possessions.

(2) Because the vessels were not provided with the *rôles*

d'équipage prescribed by the laws of France, and which it has been pretended were also required by treaty.

(3) Because sea-letters or other papers were wanting, or said to be wanting, when the property shall have been, or shall be, admitted or proved to be American. Such defect of papers, though it might justify the captors and exempt them from damages for bringing in such vessels for examination, could not with reason be a ground of condemnation.

Further on in the instruction Mr. Pickering says:

There never was, indeed, any intimation on the part of France from 1778, when the treaty of amity and commerce was made, until the passing of the decree of the Directory, in March, 1797, that a *rôle d'équipage*; other than the ship's roll or the shipping papers [see act 1790], would be required. It was then suddenly demanded, and the decree . . . was instantly enforced and became a snare to the multitudes of American vessels, which, for want of previous notice, would not have on board the document in question, if their Government should permit them to receive a document which they were under no obligation to produce. For it can not with any semblance of justice be pretended that the vessels of one nation are bound to furnish themselves with papers in forms prescribed by the laws of another. And if we resort to the treaty of 1778, or to the sea-letter or passport annexed to it, on which letter the Directory pretended to found their decree concerning the *rôle d'équipage*, we shall see that these words are not to be found in either. (*Id.* 564.)

For the purpose of argument, however, we may for the moment admit the French contention in this matter—a contention now adopted by the defense—and concede that, by relation back through the passport to the twenty-fifth article of the treaty of 1878, it became the duty of the vessel's master not to file a crew list at the port of departure, but to carry on his vessel a *rôle d'équipage* drawn and certified in accordance with the ordinances and decrees of France, and not necessarily in accordance with the statutes of the United States, to which country his vessel belonged and of which country he was a citizen.

The position being admitted, we must consider the amount of penalty which the vessel is to suffer if such a *rôle* be lacking. What penalty does the treaty impose? That instrument says nothing about a *rôle* or crew list, but demands a passport, which latter document it is urged requires the presence of a *rôle* on the vessel; the treaty pen-

alty, therefore, for the lack of this *rôle*, not mentioned in the body of the instrument, can not be greater than the penalty for the lack of the passport which is there mentioned. The object of the passport provision is clearly to be gathered from the wording of the treaty: "To the end that all manner of dissensions and quarrels may be avoided and prevented," the twenty-fifth article, it is provided that when either party is at war the vessels of the other shall be furnished with passports describing the name, property, and bulk of the ship, together with the name and abode of the master, so that it may appear that the vessel "really and truly belongs to the subjects of one of the parties." Such is the substance of the twenty-fifth article, whose object as clearly expressed is not to affix penalties, but to avoid "dissensions and quarrels."

The twenty-seventh article provides, that if a merchant ship of either party meet a man-of-war or privateer of the other, the armed ship, "for the avoiding of any disorder," shall remain out of cannon-shot, send boats to the merchantman; put no more than two or three men on board, to whom the master shall show his passport; having done which he may pursue his voyage, and the vessel may not be molested or searched in any manner, nor chased, nor forced out of her course. The passport, then, being given for the purpose of preventing "dissensions and quarrels," is by virtue of its presence alone to free the ship from search, chase, or forced deviation. No penalty is affixed for the lack of this passport other than what may be inferred, as, for example, that without it she would be liable to detention and search, and possibly to investigation by a prize court or other competent tribunal as to the honesty of her character and the innocence of her voyage.

No treaty penalty being affixed for the absence of a definitely prescribed document, how can one be held to exist for the absence of a subsidiary document which the treaty does not require the master to exhibit, even if its presence on board be necessary? An American vessel boarded by a French officer need only, so says article 27, do one thing, need only show one paper, to wit, his passport; this done, he may immediately proceed.

No rule of international law has been called to our attention, and none is known to us, which, in the absence of specific agreement to the contrary, requires the presence on vessels of any particular document. Some papers undoubtedly should be carried for protection; that is,

carried for the benefit of the ship, to divert suspicion, to avoid detention and delay, and to afford at least *prima facie* proof that she is what she pretends to be, an innocent vessel engaged in legitimate business. The nature and character of ships' papers is, however, usually a matter of municipal regulation to which foreign vessels must conform or incur certain reasonable penalties, enforceable within the territorial jurisdiction of the enacting Government. Many examples of municipal acts of this nature may be found in our own statute books.

Speaking, generally, however, aside from local regulations not enforceable by the Government of one nation over the vessels of another on the high seas, the class and kind of papers to be carried by a merchantman are prescribed by his own Government, and as between him and a foreign vessel of war these papers are *prima facie* proof of innocence and honesty; but as they are not conclusive on these points, so is their absence no more than the foundation of a reasonable suspicion deserving inquiry into the true character of the vessel and voyage. (See, also, Merlin, 2 *Prises Maritimes*, 51.)

It is of the highest importance [says Ortolan] that a vessel be in position to prove her nationality. The flag is the distinctive evident sign of the vessel's national character. Every state has its particular colors under which its citizens sail. . . . But this distinctive sign can not be the only one, for if it were it would be easy to disguise the nationality of a vessel. Therefore, to provide clear proof of this nationality, ships' papers or sea-letters are required, with which every merchantman should be provided. The number, nature, and form of these papers are regulated by the law of each country, usually through the provisions of codes of maritime commerce. (*Règles internationales et Diplomatie de la Mer*. Ortolan, vol. 1, p. 174.)

The right to visit [says Hautefeuille] must be confined to an ascertainment through examination of official papers of the nationality of the vessel met, and also in case she is bound to an enemy's port, whether faithful to her duty she carries no arms or munitions of war; that is, that she is not guilty of interference in the hostilities. These two single points ascertained, and that only by documents coming from the neutral sovereign, or his delegates, the cruiser should retire and allow the vessel, now recognized as neutral, to continue her voyage. (Hautefeuille, vol. 3, p. 428; Parsons, *Shipping*, vol. 2, pp. 475-477.)

The lack of a particular ship's paper may be punishable under certain circumstances within local jurisdiction as a police measure, but

never, so far as we know, by absolute confiscation when it is shown that the vessel is innocently pursuing a legitimate voyage. An accident is easily supposable by which, after leaving port, and while on the high seas, all the papers of a ship may by fire or water be destroyed. On that account is she to be confiscated? We know of no rule of law, municipal or international, which would authorize such a course.

The *Industry*, it is said, did not have a proper *rôle d'équipage*. The treaty did not require any, or, if it did, then it punished the lack of the *rôle* by detention, search, and inconvenience only. The crew list is a paper usually carried on a merchant vessel, but its absence is not, by international law, punishable by confiscation.

After all the discussion between the two Governments in regard to the *rôle d'équipage*, we find in article 4 of the treaty of 1800 provision for a passport identical in form with that of 1778, which could only have been so therein inserted because both Governments had agreed upon what had always been contended for by the United States, and finally admitted by France, that this form imposed upon the ship-master no obligation to carry on board his vessel the document technically known to the French law as a *rôle d'équipage*.

That France came openly to this position is shown by various cases.

In the case of the *Louise* (13 Thermidor, year IX) the council of prizes decided that the laws of France relative to *rôles d'équipage* should not be applied to foreign ships, it being sufficient that their *rôles* conformed to the laws of their own country. (*Traité des Prises maritimes*, Pistoye et Duverdy, vol. 1, p. 484.)

In the cases of the *Elizabeth* (17 Pluviose, year VII) and of *Les Deux Amis* (3 Messidor, year VIII) it was held that even a failure to produce a proper passport or sea-letter did not warrant condemnation if the neutrality of the vessel sufficiently appeared from other papers or indicia on board. (*Id.*, pp. 439, 479.)

The commissioner of the French Government very thoroughly presented this whole question in the case of the *Pegou*, on trial before the council of prizes. (*Traité des Prises maritimes*, Pistoye et Duverdy, vol. 2, pp. 51 *et seq.*)

Among other things, he said that certainly the regulations of 1744 and 1778 and the orders of the Directory required a *rôle d'équipage*, certified by public officers at the port of departure. Certainly, also, the *rôle d'équipage* is not set forth in the treaty of 1778 as among

the documents required to show neutrality. Whether the treaty or the French decrees should prevail he does not decide, but starting with the principle that all questions of neutrality are questions of good faith, in which actual facts, not simply appearances, must be examined, he holds that the absence of a required document or an irregularity in form does not authorize condemnation as prize. The truth must be sought, and that not by technical forms; simply omissions or irregularities should never obscure the truth if it be otherwise proved. The essential question is, whether the ship is or is not in fact neutral. It is not of importance that legislators have thought it their duty to require the presentation of particular papers; the severity of the legislators is always subordinate to the surrounding circumstances which alone lead to conviction. The neutrality should be proved, but this may be done notwithstanding the omission or irregularity of certain forms. On the other hand, fraud may be uncovered, though sought to be concealed under deceiving appearance. All thorns and all subtleties of law must be thrown aside "*il faut procéder par bonne et mûre délibération et y regarder par la conscience.*" And the court followed his advice thus officially given.

We are irresistibly forced to the conclusion that a condemnation based simply on the absence of a *rôle d'équipage* or upon its informality was illegal.

We do not, however, hold that the absence or informality of a ship's paper may not create a suspicion calling for explanation, or that its absence or informality may not, in connection with other evidence, give good ground for investigation and suitable punishment. The cases now before us do not present this issue. In the case of the *Industry*, Benjamin Hawkes, master, for example, there is no allegation in the decree of the tribunal, nor is there anything in the proceedings tending to show that she was not what she pretended to be, an American vessel owned by citizens of the United States, honestly pursuing a legitimate and peaceful voyage. The grounds of condemnation were solely that the *rôle d'équipage* which the vessel had on board was not in form, being signed only by one notary public "without the confirmation of witnesses," and there being written on the back of said *rôle* an unsigned certificate that a *rôle d'équipage* was not necessary.

It will probably become important to consider in the future the proposition of the defense that the captured vessel is required to prove

her innocence—that is, that the *onus probandi* rests upon her in prize proceedings. In this case, however, there is no allegation that the vessel was violating neutrality or violating any law of nations or any law of France, other than that which demanded a *rôle d'équipage* in a prescribed form. Consideration of this question is therefore reserved.

Some of the points presented in the argument we do not consider more in detail, as they have either been discussed by us before, or, in our judgment, are decided in the conclusions we have reached upon other contentions to which they are subordinate.

We thank counsel, both those representing the claimants and those who appeared in behalf of the Government, for the valuable assistance they have rendered the court by the thorough presentation of the many and complicated questions involved in these cases.

Motion denied.

WILLIAM R. HOOPER, ADMINISTRATOR, v. THE UNITED STATES, AND OTHER CASES¹

[No. 3694 French Spoliations. Decided November 14, 1887]

On the Proofs

This is the fourth decision in the French Spoliation Cases. See *Gray's Case* (21 C. Cls. 340); *Holbrook* (*ibid.* 434); *Cushing's* (22 *ibid.* 1). The important subjects considered are: The duration of the treaties with France; the right of uninsured owners to constructive insurance; the status of American vessels commissioned to attack French men-of-war and carrying armaments; the blockade of British ports in the West Indies; the liability of France for salvage on recapture; the measure of damages for freight earnings.

- I. The treaties with France, 1778, constitute the rule by which all differences between the two nations are to be measured after February 6, 1778, and before July 7, 1798. Subsequent to the latter date they are governed by international law.
- II. A treaty is in its nature a contract, and if the consideration fail or important provisions be broken by one party, the other may declare it terminated.
- III. Abrogation of a treaty may be justified by a change of circumstances.
- IV. The circumstances justified the United States in annulling the treaties of 1778; and the Act of July 7, 1798, was effective as between nations. By the enactment the compacts ended.

¹Court of Claims Reports, vol. 22, page 408.

- V. The insurance to be allowed to owners in French Spoliation Cases is neither constructive insurance nor insurance "to cover," but premiums actually paid.
- VI. A vessel fitted for the purpose of seizing French armed vessels under the Act of July 9, 1798, was legitimate prize in the limited war then defined by Congress; but the arming of a merchant vessel strictly for defense whose only object was trade did not authorize condemnation, even if a license under the *Act of June 25, 1798*, or the *Act of July 9, 1798* (1 Stat. L., pp. 512, 578), were found on board.
- VII. A vessel may be subject to seizure though not liable to condemnation; and if there be probable cause, prize courts may award the captors costs though the vessel be not good prize.
- VIII. No actual blockade was maintained by the French of any British port in the West Indies during the period of French spoliations. Therefore a provision-laden ship bound for a British port was not subject to condemnation while the treaties of 1778 remained in force.
- IX. The burden of proof in prize proceedings is on the vessel; she must clear herself from suspicion; but no particular paper is indispensable; an honest, commercial, lawful voyage may be shown though no paper be produced.
- X. The spoliations of France were illegal, and admitted by France; but by the treaty of 1800 were surrendered in consideration of a release from France of her claims against the United States.
- XI. Salvage is remuneration for aid in case of danger. During the period of French spoliations the conduct of the French prize courts rendered recapture a rescue from actual danger, and the recaptors entitled to salvage.
- XII. Freight earned is an element of value in property lost; full freight may be often recoverable although the vessel may not reach her destination; but in these cases the court adopts the general rule of commercial usage, two-thirds of the full freight as the measure of damages.
- XIII. When a vessel is actually under contract for a voyage to one port, thence to proceed to another, she has a present existing title in the freight money of the entire voyage; but this does not extend to a mere expectancy of finding a cargo at her first port.

The Reporters' statement of the case:

The first report to Congress in these cases was made on the first day of the present term, December 6, 1886. The cases reported and the findings sent up will be found in the case of *Cushing* (22 C. Cls. 1). Those findings and the opinions of this court in *Gray's Case*, in *Holbrook's Case*, and in *Cushing's Case* were likewise published by Congress, and constitute Miscellaneous Document No. 6, H. R., Forty-ninth Congress, second session.

The opinion in the present case of Hooper was delivered November 7, 1887. The findings will form a part of the second report to Congress.¹ They are as follows:

I. The schooner *John*, a duly registered vessel of the United States, of which John C. Blackler was master, sailed on a commercial voyage from the port of Salem, Mass., bound for Martinique with a cargo of codfish, hogshead bungs, and lumber, owned, one-half the vessel and the whole of the cargo, by William Gray, now deceased, of whom the claimant William Gray, of Boston, Mass., is the duly appointed administrator, and the other half of the vessel by William Blackler, now deceased, of whom the claimant William R. Hooper is the appointed administrator; all citizens of the United States.

She was of 111 tons, with seven men, had two guns, and carried a letter of marque.

II. Said vessel while lawfully pursuing her voyage was seized on the high seas, near Martinique, by the French frigate *La Syrène* (or *Cyren*) on the first day of February, 1800, and there burned, sunk, and destroyed. The captain was taken by said frigate into the French port L'Orient, where proceedings were instituted in a prize court, wherein claim was made in behalf of the owner, Gray, for payment for said vessel and cargo.

It appears that "the seizure was decided upon as much on account of default in the production of her crew list (*rôle d'équipage*) as that there was found on board a commission of war with instructions to attack French ships," elsewhere in the record called a letter of marque to attack *armed* French ships, and judgment was given against the claimant.

III. The case was taken to the council of prizes at Paris, where the captain alleged "that neither he nor his crew were allowed to take their baggage before the ship was set on fire, and that their captor took away the sails, provisions, and everything else which they thought proper." The French commissioner in his argument for the French Government before that tribunal, said, among other things, "I would argue willingly for the release of both (vessel and cargo) according to the provisions of articles of the agreement of the 8th Vendemiaire, year 9, if the property were still intact, without preliminary judgment, but this is not Mr. Gray's case, since the ship *John* was sunk and the owner had no profit from her." "I think that in the decision it

¹See Mis. Doc. No. 5, Senate, Fiftieth Congress, first session.

is fair that the council should recommend Mr. Gray to have recourse to his minister to request him to cause the fact of this carrying away to be verified, and obtain from the justice of the Government the indemnification which may be due him."

The council decided and entered a decree that "the council declares the merchant, William Gray, Jr., not justified in his claim for the value of the ship *John* and cargo, but with liberty to appeal to the Government for justice in regard to the property which he proves to have been removed from said vessel by the crew of the frigate *Syrène*."

Mr. William E. Earle, Mr. William Gray, Mr. Edward Lander, Mr. George S. Boutwell, Mr. A. H. Cragin, Mr. Leonard Myers, Mr. Lawrence Lewis, Jr., Mr. James Lowndes, Mr. Augustine Chester, and Mr. S. Prentiss Nutt were heard for claimants.

Mr. Benjamin Wilson and Mr. Charles S. Russell (with whom was *Mr. Assistant Attorney-General Howard*) for the defendants.

DAVIS, J., delivered the opinion of the court:

The court has now delivered three opinions upon general issues raised in the French Spoliations Cases. The first related to the broad questions as to the validity, against France, of the claims as a class, and the resulting liability of the United States to the claimants; the second was directed more especially to forms of pleading, the value of evidence, and rights of insurers; while the third disposed of a motion made by the defendants for a rehearing of the general questions discussed in the first opinion. (*Gray, administrator, v. The United States*, 21 C. Cls. 340; *Holbrook, administrator, v. The United States*, 21 C. Cls. 334; *Cushing, administrator, v. The United States*, 22 C. Cls. 1.)

A large number of cases have since been argued and submitted to the court, and certain general questions are found raised in many of them. Those questions we shall now proceed to discuss, as well as two points which were sent back by the court for further argument.

It is urged by the claimants that the treaties of 1778 remained in force, notwithstanding the abrogating act of July 7, 1798, until the final ratification of the treaty of 1800, and that these treaties prescribe the rule by which all the spoliation claims are to be measured. This position is denied by the Government.

For the purpose of this branch of the case, the period of the spoliations may be divided into two parts: that prior to July 7, 1798, and that subsequent thereto and prior to the ratification of the treaty of 1800.

As to the first period, we find the position on both sides to have been consistent, which a few citations covering different years will clearly show.

In February, 1793, the National Convention granted substantial favors to the United States, among them opening the ports of the colonies to American ships, and granting to produce carried in American bottoms duties the same as those imposed upon French vessels (Senate, 19th Cong., 1st sess., Doc. 102, p. 35). This was followed by the decree of March 26, 1793, granting new favors to what the Convention called their "ally nation" (*ibid.*, p. 36). Soon after this M. Le Brun, the minister of foreign affairs, replying to a complaint from our minister, Mr. Morris, said that he had requested the minister of marine "to prevent in the future the vessels of our good allies from being exposed to the attacks of our ships of war and privateers" (*ibid.*, p. 38). Upon the 9th May, 1793 (*ibid.*, p. 42), the Convention passed a decree authorizing the arrest of neutral vessels laden wholly or in part with neutral property and bound to an enemy port, or laden with enemy merchandise. Mr. Morris immediately demanded that the United States be exempted from the operation of this decree as contrary to the terms of the treaty of commerce (*ibid.*, p. 44). His request was complied with, the Convention's action in this regard being based upon the sixteenth article of that treaty (*ibid.*, p. 46).

Now occurred a curious incident in legislative history. Five days after the passage of the exemption the Convention reversed its action. Mr. Morris protested (*ibid.*, p. 47), and the 1st July the Convention again decreed "that the vessels of the United States are not comprised in the dispositions of the decree of the 9th May, conformably to the sixteenth article of the treaty concluded the 6th of February, 1778." July 27th this exception was annulled and the United States were again thrown under the effect of the original decree of the preceding May (*ibid.*, p. 50). Morris wrote Jefferson, then Secretary of State: "The decree respecting neutral bottoms, so far as it respects the vessels of the United States, has, you will see, been bandied about in a shameful manner. I am told, from Havre, that it is by the force of money that the determinations which violate our rights have been

obtained; and, in comparing dates, events, and circumstances, this idea seems to be but too well supported" (*ibid.*, p. 52). Prior to this Mr. Morris had written the minister of foreign affairs asking that the matter be fixed definitely, otherwise "we must expect to see that species of dispute multiplied, in which cupidity on the one hand and fear on the other will give place to the calumnious insinuations, which lead uninformed persons to think that the interests of individuals might influence the national decisions (*ibid.*, p. 47). This note was followed by the exemption of July, soon after which Morris laid before the foreign office more specific charges (*ibid.*, p. 51), notwithstanding which the exemption was again reversed. In all this transaction the existing force of the treaties of 1778 was nowhere denied, and in the two exception was expressly admitted.

At this time Genet was carrying on his objectionable course in the United States under the shelter, as he contended, of the treaties, whose binding effect Mr. Jefferson did not deny, while he disputed Genet's construction of them (*ibid.*, pp. 53 *et seq.*).

Mr. Morris still endeavored to secure exemption from the May decree, but without success, and finally he wrote, during October, 1793, that in effect the minister of foreign affairs had acknowledged and lamented to him the impropriety of the decree, "but unable to prevail over the greater influence for the repeal of it, he is driven to the necessity of exercising a step which it is not possible to justify. There is no use in arguing with those who are already convinced, and where no good is to be expected some evil may follow. I have, therefore, only stated the question on its true ground, and leave to you in America to insist on a rigid performance of the treaty or slide back to the equal state of unfettered neutrality" (*ibid.*, p. 75).

Mr. Monroe now succeeded Mr. Morris in Paris, and writing home that he "felt extremely embarrassed how to touch again upon their [the French] infringement of the treaty of commerce whether to call on them to execute it, or leave that question on the ground I had first placed it. . . . Upon full consideration I concluded that it was the most safe and sound policy to leave this point where it was before" (*ibid.*, p. 85). He evidently made a distinction between "advising and pressing" the execution of the treaty and insisting upon its execution. Instead of demanding its execution as a right he advised it as a politic act on the part of France, fearing that a more decided course on his part would lead to a counter demand for the execution

by the United States of the guaranty clause. To this communication Monroe received from the Secretary of State a rather tart response, of which this is the important paragraph (*ibid.*, p. 87) :

The fourth head of inquiry stated in your letter shows that you were possessed of cases which turned entirely upon the impropriety of the decree, and such, too, was certainly the fact. Now, without the abrogation of the decree, so far as it represented those cases, the redress which you were instructed to demand could not be obtained. In truth there was no cause or pretense for asking relief but upon the ground of that decree having violated the treaty. Does not this view lead to the inevitable conclusion that the decree, if operative in future instances, would be no less disagreeable, and consequently that its operation in future instances ought to be prevented, a circumstance which could be accomplished only by a total repeal?

Soon after this the Convention resolved to carry into strict execution the treaty of commerce of 1778 (*ibid.*, p. 88), so that the year 1795 opened with a similar understanding on each side as to the enduring force of the treaty.

At this time commenced to circulate in France reports as to what Mr. Jay had been doing in England. Mr. Monroe thought the utmost cordiality had been restored between the two Republics, and yet feared that the prospect had become clouded by the rumors from England. In August, 1795, newspapers reached Paris, which contained the text of the Jay treaty (*ibid.*, p. 127), and so much feeling was aroused that, after considerable delay, it was decided to send an envoy to the United States to declare to our Government the dissatisfaction of the French in "respect to our treaty with Great Britain and other acts which they deemed unfriendly to them" (*ibid.*, p. 129) ; a course which Monroe endeavored to prevent.

Thereupon followed, in March, 1796 (*ibid.*, p. 131), a "summary exposition of the complaints of the French Government against the Government of the United States," in which an infraction of the treaties is relied upon as a legitimate grievance, and in answering which Monroe (*ibid.*, p. 135) tacitly admits by his argument the enduring force of those treaties.

The Jay treaty was ratified, news thereof reached Paris (*ibid.*, p. 142), and the threatening cloud burst.

The minister of foreign affairs informed Mr. Monroe that the

Directory regarded the Jay treaty as a breach of friendship, and saw "in the stipulations which respect the neutrality of the flag an abandonment of the tacit engagement which subsisted between the two nations on this point since the treaty of commerce of 1778. . . . After this, citizen minister, the Executive Directory thinks itself founded in regarding the stipulations of the treaty of 1778 which concern the neutrality of the flag as altered and suspended in their most essential parts by this act, and that it would fail in its duty if it did not modify a state of things which would never have been consented to but upon the condition of the most strict reciprocity" (*ibid.*, p. 143). Monroe argued in reply that the treaty of 1778 had not been violated, closing with a renewal of his complaints of French conduct in regard to American commerce.

Pinckney was now ordered out to succeed Monroe, but before he reached Paris France gave notice of intended reprisals (*ibid.*, p. 147), and in October (1796), Monroe received a copy of the Executive Directory's decree of July 2, 1796, with notice that it would be applied to the United States, and that his functions as minister were suspended (*ibid.*, p. 148). The decree provided that France should treat all "neutral vessels, either as to confiscations, as to searches or captures, in the same manner as they shall suffer the English to treat them." In communicating the decision of his Government, however, the French minister was careful to state that "the ordinary relations subsisting between the two people, in virtue of the conventions and treaties, shall not on this account be suspended." Pinckney arrived, but was not received, and Monroe was dismissed with language which Mr. Adams described as "studiously marked with indignities towards the Government of the United States."

This brings us to the close of 1796, and however strained the relations of the two countries had become, neither had yet endeavored to throw off the yoke of the treaties; on the contrary, all discussion was founded upon them as still in force.

In February, 1797, the French minister of foreign affairs claimed the benefit of the treaty in a fallacious argument as to the *rôle d'équipage*, suggesting incidentally that "the Federal Government doubtless had never ceased to look upon the treaty of 1778 as obligatory upon the two nations" (*ibid.*, p. 156).

The decree of the Executive Directory of March 2, 1797, which is very harsh upon neutrals, speaks of the treaties as existing in a shape

modified by the Jay treaty (*ibid.*, p. 160). In April succeeding, the condemnation of an American vessel is excused as in accordance with treaty; and this is again done in the following November. The instructions to Pinckney, Marshall, and Gerry (July 15, 1797), recognized the treaties as still in force (*ibid.*, p. 453); and the 18th March, 1798, Talleyrand based his complaints upon them (*ibid.*, p. 493). Finally Congress found it necessary by statute to declare the treaties abrogated; an action clearly useless if they were non-existent; an action which in effect admitted their continuing force to that day.

The treaties of 1778, particularly the treaty of commerce, which is the important one for our purposes, were in existence until the passage of the abrogating act. Whatever disputes occurred between this country and France during the disturbed period following the conclusion of the Jay treaty arose from differences of interpretation of various clauses of the Franco-American treaty, and on neither side do we find seriously advanced a contention that the treaties were not in existence and were not binding upon both nations. The United States distinctly urged their enduring force, while the French departed from this position only in this (if it be a departure), that the Jay treaty introduced a modification into their treaty with us, of which they were entitled to the benefit.

We are of opinion that the treaties of 1778, so far as they modified the law of nations, constituted the rule by which all differences between the two nations were to be measured after February 6, 1778, and before July 7, 1798.

As to the period after July 7, 1798:

On that date the abrogating act passed by the Congress was approved by the President and became a law within the jurisdiction of the Constitution; a law replacing to that extent the treaties, and binding upon all subordinate agents of the nation, including its courts, but not necessarily final as the annulment of an existing contract between two sovereign powers.

A treaty which on its face is of indefinite duration and which contains no clause providing for its termination may be annulled by one of the parties under certain circumstances. As between the nations it is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party, the other may, at its option, declare it terminated. The United States have so held

in regard to the Clayton-Bulwer treaty, as to which Mr. Frelinghuysen, then Secretary of State, wrote Mr. Hall, minister in Central America (July 19, 1884):

The Clayton-Bulwer treaty was voidable at the option of the United States. This, I think, has been demonstrated fully on two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast.

Here concur two clear reasons for annulment, failure of consideration and an active breach of contract.

Abrogation of a treaty may occur by change of circumstances, as:

When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists. In most of the old treaties were inserted the *clausula rebus sic stantibus*, by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.

The maxim "*Conventio omnis intelligitur rebus sic stantibus*" is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice. (Wharton's Com. Am. Law., § 161.)

Treaties, like other contracts, are violated when one party neglects or refuses to do that which moved the other party to engage in the transaction. . . . When a treaty is violated by one party in one or more of its articles, the other can regard it as broken and demand redress, or can still require its observance. (Woolsey, § 112.)

The United States annulled, or at least attempted to annul, the treaties with France upon the grounds, stated in the preamble of the statute, that the treaties had been repeatedly violated by France, that the claims of the United States for reparation of the injuries committed against them had been refused, that attempts to negotiate had been repelled with indignity and that there was still being pursued against this country a system of "predatory violence infracting the said treaties and hostile to the rights of a free and independent nation." Such

were the charges upon which was based the enactment that "the United States are of right freed and exonerated from the stipulations of the treaty and of the consular convention heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."

The treaties therefore ceased to be a part of the supreme law of the land, and when Chief-Justice Marshall stated, in July, 1799 (*Chirac v. Chirac*, 2 Wheaton, 272), that there was no treaty in existence between the two nations, he meant only that within the jurisdiction of the Constitution the treaties had ceased to exist, and did not mean to decide, what it was exclusively within the power of the political branch of the Government to decide, that, as a contract between two nations, the treaties had ceased to exist by the act of one party, a result which the French ministers afterwards said could be reached only by a successful war.

The only question we have now to consider is that of the international relation. The annulling act issued from competent authority and was the official act of the Government of the United States. So far as it was within the power of one party to abrogate these treaties it was indisputably done by the act of July 7, 1798. Notwithstanding this statute, did not the treaties remain in effect to this extent, if no further, that they furnish a scale by which the acts of France, which we are charged to examine, are to be weighed; and in considering the legality of those acts are we not to follow the treaties where they vary the law of nations? The claimants in very learned and philosophical arguments contend for the affirmative.

In the first place we are referred by them to the course of the Executive; this, it is said, is binding upon the judiciary, and is favorable to their contention. This position we will first examine.

In 1829 the Supreme Court had occasion to construe the treaties relating to the purchase of Louisiana, particularly that of San Ildefonso. The Executive had already given an interpretation to that instrument, and Marshall, Ch. J., who delivered the opinion of the court, said on this point (*Foster et al. v. Neilson*, 2 Peters, 253) :

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own Government. There being no common tribunal to decide between them, each deter-

mines for itself on its own rights, and if they can not adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think, then, however individual judges might construe the treaty of San Ildefonso, it is the province of the court to conform its decisions to the will of the legislature if that will has been clearly expressed (p. 307).

In *United States v. Arredondo* (6 Peters, 711), and in *Garcia v. Lee* (12 Peters, 511), this principle was acknowledged and affirmed, while later in *Williams v. Suffolk Insurance Company* (13 Peters, 415), the court said as to the recognition of Buenos Ayres (p. 420) :

And can there be any doubt that when the Executive branch of the Government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the Executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him it is obligatory on the people and Government of the Union. . . . In the cases of *Foster v. Neilson* (2 Peters, 253, 307), and *Garcia v. Lee* (12 Peters, 511), this court have laid down the rule that the action of the political branches of the Government in a matter that belongs to them is conclusive.

We find in *Phillips v. Payne* an even stronger affirmance of this position when the court say that in cases like it "the judicial is bound to follow the action of the political department of the Government and is concluded by it" (92 U. S. 130).

The action of the Executive is, then, conclusive upon the judiciary when that action is taken within the jurisdiction given by the Constitution. That instrument marks out with marvelous clearness and foresight the duties assigned to each of the three branches of Government therein created; within its own domain each of these branches is supreme, the executive no less than the legislative, the legislative no

less than the judiciary, and the judiciary no less than either of the other two. How does this rule apply to the cases now before us? The legislature, with the President who approved the bill, have annulled the treaties to the extent of whatever power they may have had in the premises, which is all the power possessed by the United States over the subject-matter. Do subsequent acts of the Executive alone under these circumstances, acts done in an effort to procure compensation for injured citizens, statements made in positions assumed in a negotiation, many of them perhaps taken argumentatively, others perhaps advanced in an effort to reach a middle ground upon which both parties could stand and which would result in substantial advantage to the nation and its individual citizens; do such acts, statements, or positions necessarily bind us here?

The statute which gives us all the jurisdiction we have over these claims requires us to examine, not those claims which the United States advanced, but those claims of specified classes which were "valid" "upon the French Government." It can not be seriously contended that because the Executive pressed a claim that the claim was therefore "valid" as between the nations. The Act clears any doubt on this point, if there could be any, by prescribing the test we are to apply in ascertaining the validity of a claim; that test is "the rules of law municipal and international and the treaties of the United States applicable to the same."

The distinction we have heretofore made must be emphasized between the position and jurisdiction of this court under this very exceptional statute, and their position and jurisdiction, or those of any other court of the United States, when acting under general laws, whether statutory or unwritten.

Because the President urged a claim upon France it did not necessarily become as between France and the United States a "valid" claim. The rule as to the effect of Executive decision applies as well in France as in the United States; France resisting the claim may contend with equal force that her position is correct, and yet one of the parties to the dispute must be wrong. This *reductio ad absurdum* seems hardly necessary, and yet it serves to illustrate the distinction we seek to make clear as to this court's peculiar jurisdiction. Suppose the decision of the Executive, even in the case assumed, be binding upon the judiciary administering the law within the United States, and the authorities do not go to this extent, still it does not follow that

such a decision upon any of these claims is binding upon us now. We are instructed to discover, not what the Executive believed or contended for or argued, but what claims were in fact and in law "valid" as against France, and valid by the rules of law, municipal and international, and the treaties.

The contention has, however, other aspects, which must have serious examination; and it therefore becomes necessary to see what was the contention of this Government as to the treaty rules after the passage of the annulling statute. For this purpose we must again turn to the correspondence.

It is well to bear in mind that the question of the guaranty had well nigh been eliminated from discussion. France had never formally asked its enforcement; on the contrary, had preferred that we should remain at least nominally neutral that she might reap the benefit of our food supply. Monroe had feared that too strong a position on our part might bring about a demand for the aid pledged; but Pickering had no apprehension, and clearly regarded the obligation as without practical danger. Fear of the guaranty hampered our officers; but the real practical difficulty on the French side was the Jay treaty; on ours, the spoliations.

Monroe was dismissed; Pinckney was not received; the Pinckney, Marshall, Gerry mission was not officially recognized, and they had returned home, when, in October, 1799, Mr. Pickering, Secretary of State, addressed to Messrs. Ellsworth, Davie, and Vans Murray, the newly appointed ministers to France, their instructions, in which under thirty different heads, concluding with seven *ultimata* he set forth the position of the United States. He told them that the conduct of France would well have justified an immediate declaration of war, but desirous of maintaining peace and being willing to leave open the door of reconciliation, the "United States contented themselves with preparations for defense, and measures calculated to protect their commerce" (Doc. 102, p. 561). The claims for "spoliation" are to be advanced immediately as an indispensable condition of a treaty, and all captures and condemnations are to be deemed "irregular or illegal when contrary to the law of nations generally received and acknowledged in Europe, and to the stipulations in the treaty of amity and commerce of the 6th of February, 1778, fairly and ingenuously interpreted, while that treaty remained in force, especially when made and pronounced."

In this instruction, then, Mr. Pickering draws the line very distinctly between the standard of demand as to claims arising prior to the annulling statute and those founded upon acts committed subsequent thereto. Further on he says (*ibid.*, p. 570) :

The seventeenth and twenty-second articles of the commercial treaty between the United States and France of February 6, 1778, have been the source of much altercation between the two nations during the present war. The dissolution of that and our other treaties with France leaves us at liberty with respect to future arrangements; with the exception of the now preferable right secured to Great Britain by the twenty-fifth article of the treaty of amity and commerce. In that article we promise mutually that while we continue in amity, neither party will in future make any treaty that shall be inconsistent with that article or the one preceding it. We can not, therefore, renew with France the seventeenth and twenty-second articles of the treaty of 1778. Her aggressions, which occasioned the dissolution of that treaty have deprived her of the priority of rights and advantages therein stipulated.

He speaks of the "dissolution" of the treaties as of an existing fact, says the United States can make no treaty, that is, no new treaty inconsistent with the Jay treaty, that therefore they can not "renew"—note the word—certain articles of the French treaty; in short, the whole instruction is founded upon an admission at least, if not an assertion, that the treaties no longer were in force.

The newly-appointed ministers, acting under these instructions, opened negotiations by proposing to arrange, first, claims of citizens of either nation, whether founded on contract, treaty, or the law of nations, and then, to stipulate for reciprocity and freedom of commercial intercourse (*ibid.*, p. 580). The French, however, thought the first object of negotiation should be "the determination of the regulations and the steps to be followed for the estimation and indemnification of injuries for which either nation may make claim for itself, or for any of its citizens. And the second object is to assure the execution of treaties of friendship and commerce made between the two nations" (*ibid.*, p. 581). We have already so fully considered the details of this long negotiation (21 C. Cls. 340 *et seq.*) that they need not now be repeated. A careful rereading of all the correspondence which we have been able to obtain on this subject but confirms our previous conclusion that—

Starting under their instructions, events had forced the ministers to offer unlimited recognition of the treaties of 1778, coupled with a pecuniary equivalent to extinguish in the future their most onerous provisions; even this was not accepted, and the French, returning to their original ground, said that no indemnity could be granted unless the treaties were recognized without qualification as to the future, and this they said with the avowed object of avoiding the payment of indemnity.

The American ministers recognized that the French contention had substantial value, so much so that they offered 8,000,000 francs to settle it; but they did not recognize that it was correct in fact or law, or that the annulling act was without effect. On the contrary they argued:

A treaty being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the other to renounce and declare the same to be no longer obligatory. . . . For a wrong decision it would doubtless be responsible to the injured party, and might give cause for war; but even in such case, its act of public renunciation being an act within its competence would not be a void but a valid act, and other nations whose rights might thereby be beneficially affected would so regard it. (Doc. 102, p. 612.)

Finally, the second article of the treaty of 1800, as signed in Paris, expressly stated that the ministers plenipotentiary of the two parties were not able to agree respecting either the treaties or indemnities. These points then remained as they were at the opening of the negotiation.

We fail to find that the Executive did, after the passage of the annulling statute, recognize the existing force of the treaties as an international obligation, whatever value may have been accorded to the claim of France that one party was without power to abrogate them.

The course of the Executive in the long contentions with France is not binding upon us now under the jurisdiction given by the statute of January, 1885. That statute grants a very peculiar power, imposes upon us a very original duty—that of examining in the light of law, municipal and international, and in the light of the treaties, the validity of the claims of this Government against that of France. Such a grant of jurisdictional power necessarily negatives any binding pre-

sumption founded upon Executive action. The President, individually and through the Secretary of State, expressly and repeatedly demanded satisfaction of the spoliation claims. This was of course known to the legislature which directed us to investigate these very claims. The Congress does not do a vain act, and to require us to examine the validity of claims under a rule of law which presupposes them to be valid because the Executive urged them in diplomatic negotiation would be vain. The intention of the statute is that we shall not be concluded by the President's position in these negotiations, but shall, under the standard set for us, inquire afresh as to the claims' "validity" against France. Even if this were not so, still there is nothing in the action of the Executive, after the act of 1798, tending to show an intention to recognize the continuing existence of the treaties. On the contrary, the whole argument proceeded upon the opposite hypothesis.

Claimants contend that not the act of 1798 but the agreement to expunge the second article of the treaty of 1800 terminated the treaties of 1778. The rescission of that article undoubtedly terminated the dispute as to the existence of these treaties and removed that dispute from the forum of international discussion. We are not prepared to admit that it recognized as valid the contention of France as to the treaties, although it recognized that the contention had substantial value. A claim may be admitted to have value for purposes of negotiation or compromise without an admission of its validity in fact or law. This is true in private affairs, and is especially true in diplomacy where questions of national pride, tradition, custom, and pique have to be considered most carefully and often are of most serious importance.

Counsel urge that France insisting the treaties remained in force should be bound by them, and they make the apt illustration that if the two nations had agreed at the time upon mutual indemnities France would have been held to the treaty rules. This assumption is probably correct. France having obtained the benefit she desired would in justice be bound by the corresponding obligation. "*Qui sentit commodum sentire debet et onus.*" But that is not this case, for France entirely failed to secure a recognition of the continuing force of the treaty.

The treaty of 1800 contained a provision that "property captured and not yet definitively condemned" should be restored upon produc-

tion alone of the passport of 1778. These captures must, in almost all instances if not in all, have taken place subsequent to the annulling statute, and it is urged with much force that if the treaties were non-existent France was entitled to demand the proofs required by the general law of nations; as she expressly yielded this point and, as to these cases, agreed to abide by the treaty rule, therefore it can not be doubted (urge counsel) that had these claims now before us been taken into the treaty of 1800 they would have been subjected to the same standard.

Perhaps they would have been. France, obtaining treaty recognition, would have been bound by treaty rules; but this did not occur, and as France failed to obtain treaty recognition is she therefore to be bound by treaty rules because in one instance she made a special exception in specific terms? We think not. A treaty changes the law of nations only in so far as it contains provisions to that effect. The parties may covenant that as between themselves the law of nations shall not apply in particular instances; except in those instances that law remains in force.

The treaties had served their purpose; the conditions which they contemplated had changed. Whatever may have been the justice of French complaints of our course with Great Britain, and whatever may have been her rights under the circumstances, still she had so invaded the rights of the United States to free commerce in innocent cargoés upon the high seas, that a case was presented of such failure of consideration, and of such active infraction of the treaties, that this country was in a position to proclaim them ended.

Free ships, free goods, had become a dead letter. The passport which the treaty prescribed as a sufficient protection was disregarded, and various other aggressions upon the shipping of the United States were committed; aggressions admittedly forbidden by the treaty provisions.

We are of opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute, but as between the nations; and that thereafter the compacts were ended. We fail to find any agreement by France as to these claims to submit to the treaty rules after July 7, 1798, the treaties not being recognized by us, and we conclude that the validity of claims not expressly mentioned in the treaty of 1800, which arose after July 7, 1798, is to be ascertained by the principles of the law of

nations recognized at that time, and not by exceptional provisions found in the treaties of 1778.

Insurance to cover is that amount of insurance which in case of accident will entirely reimburse the insured for his loss. It includes not only the value of the property, but also the cost of the insurance procured to protect it.

Phillips in his work on insurance thus states the question argued here (§ 1221):

The premium on the premium is to be included in computing the amount to be insured in order to cover the interest and replace the exact value of the subject in case of total loss.

Some of the claimants ask that they be allowed unpaid premiums of insurance as an element of the value of property lost, and if so that such premium be allowed upon the theory of insurance to cover.

The able arguments and briefs of counsel for claimants on these questions have been listened to and examined with great care. Whatever difficulty we might find were the matter here presented for the first time is removed by the precedents established by the Supreme Court. In the *Anna Maria* (2 Wharton, 325), the court allowed "the value of the vessel and the prime cost of the cargo with all charges, and the premium of insurance, where it has been paid, with interest." In *Malley v. Shattuck* (2 Cranch, 458), the court said (citing *The Charming Betsy*):

In pursuance of that rule the rejection of the premium for insurance, that premium not having been paid, is approved; but the rejection of the claim for outfits of the vessel and the necessary advance to the crew is disapproved. Although the general terms used in the case of *The Charming Betsy* would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principle with the premium of the insurance, if actually paid, which was expressly allowed.

Following the Supreme Court we shall allow premiums of insurance when actually paid, and not otherwise.

In cases heretofore submitted a question arose as to the effect upon claimants' rights of the following facts, or either of them, should they or either of them be found to exist:

A. That the vessel acted as a privateer.

B. That the vessel possessed the license or authority described in either the Act of June 25, 1798, or in the Act of July 9, 1798, authorizing the class of seizure described in those acts or in the Act of May 28, 1798.

These questions were ordered to be and have been reargued.

The provisions of the three laws above recited are very different in effect, that of the latest date being the one most important in the consideration of these cases. The *Act of May 28* (1 Stat. L. 561), "to more effectually protect the commerce and coasts of the United States" empowered the President to give certain orders to the armed vessels of the nation and contained no allusion to vessels owned by individuals. The *Act of June 25* (*ibid.*, p. 572) authorized "the defense of the merchant vessels of the United States against French depredations," and to that end allowed the commanders and crews of such vessels to "oppose and defend against any search, restraint, or seizure" attempted by a French vessel, to "repel by force any assault or hostility" on the part of such French vessel, to "subdue and capture the same" and to retake any American vessel captured by the French.

The *Act of July 9* (*ibid.*, p. 578) gave to private armed vessels specially commissioned the same license and authority "for the subduing, seizing, and capturing any armed French vessel, and for the recapture of the vessels, goods, and effects of the people of the United States, as the public armed vessels of the United States may by law have" (§ 2). This statute, therefore, authorized private armed vessels to take any armed French vessel "found within the jurisdictional limits of the United States or elsewhere on the high seas" (§ 1), and to recapture American vessels taken by the French. (See Acts of May 28 and June 25, 1798.)

Many of the vessels whose cases are before us carried armament of some kind, and several are shown to have had a special license, commission, or authority issued probably by virtue of the power given the President in the last two acts of Congress.

The marked distinction between the act of June and that of July is in this: The former permitted defense only, except in the matter of recapture, while the latter authorized attack, but attack only on armed vessels. Nowhere in the statutes is there any permission given to molest French merchantmen, although France was then engaged in the acts of illegal seizure and condemnation from which the spoliation claims arose. Defendants urge that the arming of a merchantman

and the presence on board of a special license under the acts cited destroyed any right of recovery as against France and consequently as against the United States.

We have held (*Gray's Case*, 21 C. Cls. 375) as to the relations between the two countries during the period in question that "no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war, in its nature similar to a prolonged series of reprisals." There was not what Wheaton calls "a perfect war," but a war "limited as to places, persons, and things"; the Congress authorized hostilities, but only on the high seas or within the jurisdictional limits of the United States, and then only by certain specified vessels upon certain specified vessels. As far as Congress authorized and tolerated it so far might we proceed in hostile operations, and the word "enemy" goes the full length of this qualified war and no further (21 C. Cls. 371). The hostilities were confined on the side of the United States to attack on French armed ships and to recapture of our own. The capture of enemy mercantile shipping is an important mark of a state of war, one of its principal incidents, and it is significant of the relations between the two Governments that not a movement was made by Congress or the Executive in this direction.

A privateer is an armed vessel belonging to one or more private individuals, licensed by Government to take prizes from an enemy; its authority in this regard must depend altogether upon the extent of the commission issued to it, and is qualified and limited by the laws under which the commission is issued. (*The Thomas Gibbons*, 8 Cranch, 421.)

Letters of marque and reprisal may theoretically issue in time of peace (articles of Confederation signed 1778, art. 9), as they form a "mode of redress for some specific injury which is considered to be compatible with a state of peace and permitted by the law of nations" (Kent, vol. 1, p. 61). The commission authorizes "the seizure of the property of the subjects as well as of the sovereign of the offending nation and to bring it in to be detained as a pledge, or disposed of under judicial sanction in like manner as if it were a process of distress under national authority for some debt or duty withheld" (*ibid.*). Speaking very technically, a letter of marque is merely a permission to pass the frontier, while a letter of reprisal authorizes a "taking in

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return," a taking by way of retaliation, a *captio rei unius in alterius satisfactionem*. The colloquial use together of the two names, letter of marque and letter of reprisals, leads sometimes to misunderstanding as to the differing effect of each, one being a simple authority to depart, the other an authority to seize property in compensation for an injury committed.

The licenses or commissions of 1798 contained no hint of intended reprisals, for no authority to seize a French merchantman is contained in them, although the French had long been capturing our commercial marine. There was, however, express authority to seize armed vessels and to recapture American vessels; that is, in its essence, authority to defend, not to attack.

Within the limits prescribed by the Congress there was war; limited, imperfect war, not general public war, but war complete as to the vessels engaged in it to the extent only of the powers given by the Congress. Following in the path marked out by the Supreme Court in the prize cases which came before them during this period, and of which *Bas v. Tingy* is a fair example, we are led to the conclusion that where a private vessel was fitted for the purpose of attacking armed French vessels, and of recapturing American vessels seized, she fell within the rules of war, and if captured, became legitimate prize. The relations of the two nations being strained to hostilities within certain distinctly defined bounds, within those bounds the active agents of either Government were subject to the rules of war, and vessels intending to seize must submit to seizure.

It does not, however, follow that every vessel having a special license under the acts of 1798, or every vessel having some armament on board, falls within this rule. Long within the memory of men now living, many portions of the ocean since freely opened to commerce were infested by pirates who boarded peaceful merchantmen, plundered the vessels, and murdered the crews, or dragged them to the horrors of slavery. The literature relating to the early part of the century is filled with anecdotes based upon the outrages of such freebooters, and the heroic deeds of those sent out by the different Governments to capture or destroy them. Vessels tempting these waters found it advisable to carry some armament, so that failing efficient convoy, or in case of other accident, they might be prepared to cope on comparatively equal terms with these robbers of the sea.

At the particular period we now are considering, to the danger from

pirates in some parts of the world was added the danger from French privateers who acted in so illegal and unjustifiable manner as to call from Lord Stowell this opinion :

It has certainly been the practice of this court, lately, to grant salvage on recapture of neutral property out of the hands of the French, and I see no reason at the present moment to depart from it. I know perfectly well that it is not the modern practice of the law of nations to grant salvage on recapture of neutral vessels, and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him, inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. This proceeds upon the supposition that those tribunals would duly respect the obligations of the law of nations ; a presumption which, in the wars of civilized nations, each belligerent is bound to entertain in their respective dealings with neutrals. But it being notorious to all Europe, in the present war, that there has been a constant struggle maintained between the governing powers of France, for the time being, and its maritime tribunals, which should most outrage the rights of neutral property—the one by its decrees, or the other by its decisions—the liberation of neutral property out of their possession has been deemed, not only in the judgment of our courts, but in that of neutrals themselves, a most substantial benefit conferred upon them, in a delivery from danger against which no clearness and innocence of conduct could afford any protection. And a salvage for such service has not only been decreed, but thankfully paid, ever since these wild hostilities have been declared and practiced by France, against all acknowledged principles of the law of nations and of natural justice. When these lawless and irregular practices are shown to have ceased, the rule of paying salvage for the liberation of neutral property must cease likewise.

No proof is offered that the maritime tribunals of France have, in any degree, corrected either the spirit or the form of their proceedings respecting neutral property generally ; and, therefore, I shall not think myself authorized to depart from the practice that has been pursued, of awarding a salvage to the captors. (*The Onskan*, 2 Robinson, pp. 300, 301.)

And later he said :

It is certainly true that the standing doctrine of the court has been that neutral property, taken out of the possession of the

enemy, is not liable to salvage. It is the doctrine to which the court has invariably adhered till it was forced out of its course by the notorious irregularities of the French cruisers and of the French Government, which proceeded without any pretense of sanction from the law of nations, to condemn neutral property. On these grounds it was deemed not unreasonable by neutrals themselves that salvage should be paid for a deliverance from French capture. The rule obtained early in the war, and has continued to the present time. It is said that a great alteration has taken place in the French proceedings, and that we are now to acknowledge a sort of return of "*Saturnia regna.*" This court is not informed, in a satisfactory manner, that any such beneficial change has taken place in the administration of prize law in the tribunals of France; and, therefore, it will continue to make the same decree till the instructions of the superior court shall establish a different rule. (*Eleonora Catharina*, 4 Rob. 157 See also *Talbot v. Seeman*, 1 Cranch, 1.)

In the Gulf of Mexico the danger of seizure by small vessels, technically French privateers, but actually so irresponsible to governing power as to be in form only superior to freebooters, made the possession of some armament by an innocent trader a matter of wise precaution, if not of necessity, especially as in some instances the danger from the French tribunals was nearly as great as from the privateers. We are told, for example, that vessels were condemned by such tribunals because the ship's compass had an English brand, because the cooking utensils were of English manufacture, or because the vessel was destined to an English port. The Secretary of State thus characterized the situation:

American property had even been taken when in their own ports, without any pretense, or no other than that they wanted it. At the same time their cruisers are guilty of wanton and barbarous excesses, by detaining, plundering, firing at, burning, and distressing American vessels.

The acts of the French privateers were so illegal as to be stigmatized as "piracies" both by Mr. Pickering and in the two Legislative Councils of France (Doc. 102, p. 410).

As early as June, 1793, Morris complains "of the plundering of our ships, of which complaints are daily made to me and which the present Government of the country is too feeble to prevent" (*ibid.*, p. 48), and he writes to the French minister "that it will be very difficult, and

perhaps impossible, to prevent your privateers from committing illegal and outrageous acts as long as they are permitted to bring into your ports all the American vessels laden with articles of food for countries at war with France" (*ibid.*, p. 49). Later he informs the Secretary of State that "in the present state of the country the laws are but little respected; and it would seem as if pompous declarations of the rights of man were reiterated only to render the daily violation of them more shocking" (*ibid.*, p. 52). In October he says "the courts chicane very much here," and he speaks of their proceedings as "iniquitous" (*ibid.*, p. 67). In December, 1796 (*ibid.*, p. 151), Major Mountflorencia, in his general report as to American commercial interests in France, says that on the 27th of the preceding April power had been given to the tribunals of commerce in every port of France to take cognizance in the first instance of every matter relative to captures at sea, with an appeal to the civil tribunals of the different departments, and with a reference in certain instances to the minister of justice.

He adds:

The tribunals of commerce are chiefly composed of merchants, and most of them are directly or indirectly more or less interested in the fitting out of privateers, and, therefore, are often parties concerned in the controversies they are to determine upon.

In illustration he cites the condemnation of the *Royal Captain*, saying that most of the "judges were concerned in the capturing privateer."

In January, 1797, Mr. Pickering wrote to Mr. Pinckney as follows:

The commissioners and special agents of the French Republic in the West Indies are destroying our commerce in the most wanton manner. They have issued orders for taking all American vessels bound to or from English ports—not those only which the English occupy in St. Domingo, but those of their own islands. They condemn without the formality of a trial. These orders appear from the information I have received to have been issued in consequence of letters from Mr. Adet, who, you will see in his note of November 15, said the French armed vessels were not merely to capture American vessels, but to practice vexations towards them; and who, I am further informed, wrote to the commissioners that they could not treat the American vessels too badly. This state of things can not continue long. It makes little difference whether our vessels go voluntarily to French ports or are carried in as prizes. In the latter case they condemn without

ceremony, and, in the former, they forcibly take the cargoes, heretofore with promises of payment, which they generally broke; and now, I am told, without even deigning to give their faithless promises (*ibid.*, p. 154).

In the following February he writes again to Pinckney, saying (*ibid.*, p. 154):

The spoliations on our commerce by French privateers are daily increasing in a manner to set every just principle at defiance. If their acts were simply the violation of our treaty with France the injuries would be comparatively trifling, but their outrages extend to the capture of our vessels merely because going to or from a British port. Nay, more, they take them when going from a neutral to a French port. In truth, there is, in a multitude of cases, little difference whether our vessels are carried in as prizes or go voluntarily to the French ports in the islands for the purposes of traffic; the public agents take the cargoes by force and fix their own terms, giving promises of distant payment, which are seldom duly performed. With regard to the vessels carried in as prizes, the agents and tribunals of the French Government act in concert with the privateers. The captured are not admitted to defend their property before the tribunals; the proceedings are wholly *ex parte*. We can account for such conduct only on the principle of plunder, and were not the privateers acting under the protection of commissions from the French Government, they would be pronounced pirates. Britain has furnished no precedents of such abominable rapine.

In April, he writes again (*ibid.*, p. 164) that "the depredations of the French in the West Indies are continued with increased outrage, and we have advices of captures and condemnations in Europe which apply to no principle heretofore known and acknowledged in the civilized world." (See also *ibid.*, pp. 166, 171, 173, 174, 177.)

Citations of this kind might be multiplied, but it seems useless to do so, as the situation is familiar history. Certainly, under these circumstances, some attempt at defense was natural and excusable, if not justifiable.

Judges "are not to shut their eyes to what is generally passing in the world" (Blatchford's Prize Cases, p. 448), nor as to what has already taken place. In danger from native pirates, in danger from French privateers often as irresponsible (*Cushing's Administrator*, 22 C. Cls. 1), the mere possession of some armament by a merchantman is devoid of marked significance. It is improbable that any important

venture was sent to sea without an effort on the part of the ship-owner to protect his property and that laden on his vessel; cannon enough or muskets enough he would put on board to give his crew a fair chance of escape from a small force. The statute, however, said that no armed merchantman should receive a clearance or permit, or be suffered to depart unless the owners and the master gave bond conditioned, among other things, that the vessel should not commit any depredation, outrage, unlawful assault, or unprovoked violence upon the high seas against the vessel of any nation in amity with the United States (1 Stat. L., p. 573). Under this act no vessel having any armament could proceed to sea without bond first given, and this bond, being coupled in the acts with the issuance of special orders or license, what more natural than for the innocent merchantman, desiring only safe transit of a commercial venture, to receive in return the commission which the act provided should be given him. The *Act of July 9* (*ibid.*, p. 578) contains a similar provision, and the result of both statutes is that no private vessel carrying armament could proceed to sea without bond filed in return for which a commission might be issued.

In our view of the case it is vital to note the distinction between armament for protection simply and armament for attack upon armed vessels or for attack upon captured American vessels necessarily in charge of prize crews. A privateer is maintained for profit; the venture is most speculative in its nature, bringing large returns for great risk. Given the right to prey upon the mercantile marine, great armament is not necessary, as combat may be avoided by speed and quickness in manœuvre. The privateering authorized by the acts of 1798 was of no such nature; not a prize could be taken without conflict, for only armed vessels, or vessels in charge of prize crews, could be seized; not a merchantman was allowed to be molested. A vessel, then, fitting out under the acts of 1798 for the purpose of waging the limited hostility therein permitted, must have been prepared for battle; must have been ready to wage war. She could not mount a few guns and carry a few dozen muskets, with a small crew, when the success of her voyage depended upon the number of well-defended vessels she should send into port for condemnation. A vessel intended to act aggressively under the laws of 1798 would have to fight for every dollar brought into the pockets of the owners, master, and crew, and, knowing this, would proceed to sea with an equipment sufficient for the very serious work contemplated.

One of the vessels holding a commission under the acts of 1798 was a schooner of about 111 tons, old measurement. She had a crew of seven men, carried what was called a letter of marque, two guns, and a cargo of merchandise; she was duly cleared on a trading voyage, with instructions to the master as to the sale of the cargo and the purchase of a return venture. Such a vessel as this could not have been seriously intended to seize French armed vessels or captured American vessels defended by French prize crews. Seven men, all told, were barely enough to navigate the schooner; aside from the master, there were but three to a watch, and on an emergency it is extremely doubtful whether the total force was sufficient to handle the two guns and the vessel at the same time. Possibly some defense might have been made against a boat-load of pirates putting off from the shore while the schooner lay becalmed near it, but it is not within the bounds of possibility that such a vessel, with so slight a crew and so insignificant an armament, should contemplate attack upon a well-defended vessel.

We are told that 365 vessels, of 66,691 tonnage, carrying 6,847 men and 2,723 guns, received commissions under the acts of 1798, prior to March 2, 1799. The average tonnage per vessel was then 185 tons, the average crew 16, and the average armament 7 guns. On the other hand, one Government armed vessel (taken for illustration) of 190 tons burthen carried 18 guns and 140 men, while another of 200 tons carried the same armament and crew. So far as has yet appeared to us, no private armed merchantman made a single capture from the French, and we are assured that no such capture was made. So far as concerns the cases now before us, it would be practically impossible for such a capture to be made, for most of the vessels were small, and they were manned only for ordinary navigation and not for war, with an armament insufficient to cope with organized military force. Neither seven nor even sixteen men is a crew for a vessel intended to attack French armed ships or to recapture those manned by prize crews, and no merchantman with so small a crew and laden with valuable cargo would undergo such risk.

That Congress did not contemplate the employment in attack of small or undermanned vessels is shown by the proviso in the act of July 9, 1798, that the bond should be doubled in case "the vessel be provided with more than one hundred and fifty men," from which an inference may not unfairly be drawn that not far from one hundred and fifty was considered a fair equipment for a vessel designed to

fight. We have seen that the Government war vessels about equivalent in tonnage to the average licensed merchantman carried about one hundred and forty men, and coupling this fact with the act of Congress we reach the result already indicated by common sense, that Congress had in mind, so far as privateers were concerned, fighting ships—those able to attack a French privateer with reasonable hope of success, and not vessels with insignificant crew and armament, bound on a trading voyage, and provided with those slight means of defense which were at the time ordinarily carried by merchantmen for protection.

That armament, when carried by strictly commercial vessels bound upon trading voyages, was intended for defense is shown by the report of the House Committee, made January 17, 1799 (American State Papers, Naval Affairs, vol. 1, p. 69). They said:

Your committee begs leave to report further, that about the time of the sailing of our ships of war, and before the merchant ships were permitted to arm for their defense, our trade was in such jeopardy at sea and on the coast from French privateers, that but few vessels escaped them; that ruin stared in the face all concerned in shipping, and that it was difficult to get property insured.

Hamilton, then Secretary of the Treasury, officially expressed the opinion of his Government as to armed merchantmen in his circular of August 4, 1793, as follows:

The term privateer is understood not to extend to vessels armed for merchandise and war, commonly called with us letters of marque, nor, of course, to vessels of war in the immediate service of the Government of either of the powers at war.

Twelve days later Jefferson, in an instruction to Morris as to the English ship *Jane*, which Genet had requested might be ordered to sail, a request authorized, Genet contended, by the twenty-second article of the treaty of commerce, said (Doc. 102, p. 58):

The ship *Jane* is an English merchant vessel, employed in the commerce between Jamaica and these States. She brought here a cargo of produce from that island, and was to take away a cargo of flour. Knowing of the war when she left Jamaica, and that our coast was lined with small French privateers, she armed for her defense, and took one of those commissions usually called

letters of marque. She arrived here safely without having had any rencontre of any sort. Can it be necessary to say that a merchant vessel is not a privateer? That though she has arms to defend herself in time of war, in the course of her regular commerce, this no more makes her a privateer than a husbandman following his plow in time of war with a knife or pistol in his pocket is thereby made a soldier. The occupation of a privateer is to attack and plunder; that of a merchant vessel is commerce and self-preservation. The article excludes the former from our ports, and from selling what she has taken; that is, what she has acquired by war, to show it did not mean the merchant vessel and what she had acquired by commerce. Were the merchant vessels coming for our produce forbidden to have any arms for their defense, every adventurer who has a boat, or money enough to buy one, would make her a privateer; our coasts would swarm with them, foreign vessels must cease to come, our commerce must be suppressed, our produce remain on our hands, or at least that great portion of it which we have not vessels to carry away; our plows must be laid aside, and agriculture suspended. This is a sacrifice no treaty could ever contemplate, and which we are not disposed to make out of mere complaisance to a false definition of the term privateers.

This matter has also been specifically passed upon by the French courts. The ship *Fame*, Rust, master, was, in June, 1799, tried by the tribunal of commerce sitting at Bayonne. Several grounds were relied upon by the captors as authorizing condemnation, all of which were overruled by the tribunal. Among them was the following:

Is the letter of marque, of which the vessel was the bearer, sufficient to cause it to be considered as an enemy?

This question was thus answered:

Considering the point relative to the letter of marque of which the ship was the bearer. That the French Government without doubt is not ignorant of the delivery of like letters by the Government of the United States to the vessels of the said United States nor of the terms in which these letters are conceived. That now and up to the present time it has not been manifested that it regarded this circumstance and the act of Congress of the United States of the month of July, 1798, either as a declaration of war, or as hostilities against France, since it has not asked of the legislative body a law declaring the French nation to be in a state of war with the United States of North America. That a state of war can not be established or declared without a law of the legis-

lative body. That it does not belong to the tribunals to take notice of any step that a foreign power may take as constituting a state of war between France and itself.

That the condemnation demanded, of the said ship *Fame* and of her cargo because of the said letter of marque, can not be founded upon any law, and can not and ought not to be pronounced. The said ship besides, not having opposed any resistance, suffered itself to be visited at the summons which was made to it by the said privateer. There is, then, no occasion to accede to the demand of the captors upon this point. (See Record in case *Nathaniel Richardson, executor of Joshua Richardson et al. v. The United States*, No. 5343.)

This case was appealed to the civil tribunal of the department, and thence to the council of prizes, which latter tribunal, on the 13th December, 1800, released the vessel and cargo in accordance with the judgment of the two lower tribunals.

The *Pegou* carried ten cannon. She was provided with muskets and munitions of war.

The law officer of the French Government having charge of the case made the following points among others (see Pistoye et Duverdy, *Prises Maritimes*, vol. 2, p. 51) :

It is not enough to have or carry arms to deserve the reproach of being armed for war (p. 52).

War armament is for purely offensive use. This is shown when there is no object in the armament but attack, or at least when everything tends to prove that such is the principal object of the enterprise. . . . But defense is a natural right, and means of defense are legitimate in sea-voyages as in all other occurrences perilous to life. A vessel having but a small crew, whose cargo was considerable, was evidently intended for commerce, not for war. The arms found in this vessel were not intended for violence or hostility, but to prevent them; not to attack, but to defend. The point as to war armament, then, seems to me unfounded.

The *Pegou* was discharged with damages to her captain.

In the case of the *Friend*, of Boston, a letter of marque had been found on board; the vessel was armed for defense; there was no resistance; summons from the privateer was obeyed, and the master's instructions directed him to avoid acts of offense and to be prudent. The commissaire of the Government urged that these were not reasons for capture. The vessel was condemned on other grounds. (Pistoye et Duverdy, vol. 1, p. 501.)

Further, Article IV of the treaty of 1800, which relates to "armed" and "unarmed" merchantmen, shows that France did not stand upon the point urged here by the defense, but admitted the right of armament to the extent at least of the cases now before us, as its courts did in the cases cited above.

It is worthy of remark that two classes of license or commission were allowed by the acts of Congress. The first act authorized instructions from the President as to defense only, except that the recapture of American vessels was permitted. The second act allowed capture of armed Frenchmen. In the absence of proof as to which document a vessel possessed there can be no presumption that it was issued under the latter rather than under the former statute; in fact, the presumption, which always favors what is natural, might lean towards the possession of instructions under the first act when it appears that the crew was small, the armament light, and the object of the voyage commercial in its nature.

The distinction must not be forgotten between a legal and justifiable seizure and an illegal and unjustifiable condemnation. The seizure of a vessel may be successfully defended upon grounds which would not support a subsequent condemnation, and "prize courts deny damages when there was probable cause for the seizure, and are often justified in awarding to the captors their costs and expenses," even when the vessel and cargo are decided not good prize and are returned to their owners. (*The Thompson*, 3 Wall. 155; *Jecker v. Montgomery*, 13 How. 498; *Murray v. The Charming Betsy*, 2 Cr. 64.)

We conclude that a vessel fitted for the purpose of seizing French armed vessels and of recapturing American vessels was, when taken, legitimate prize as an actor in the limited war defined by Congress; but that the mere arming of a merchantman whose object was trade, subordinate to which was the provision for protection, did not authorize seizure and condemnation even if an instruction or license under either of the acts of 1798 were found on board. In these cases, as in every case arising between nations, technicalities must be thrown aside, and the very essence and spirit of the transaction must be discovered by the light of the facts peculiar to each case.

It is urged by the defendants that the British possessions in the West Indies were in a state of blockade and occupied in such manner as properly to be regarded in a state of siege. That, therefore, the con-

demnations of vessels bound for those ports with cargoes otherwise innocent were legal and justifiable. The argument has turned more particularly upon vessels bound for Martinique, so that for purpose of illustration we will consider the case of that island, formerly a French possession and captured by England during the war.

The defendants' argument assumes that Martinique was blockaded; that it was practically in a state of siege; that its predominant character was that of a port of military naval equipment; and therefore the seizure of neutral vessels bound to that port was justified, although the cargo was otherwise innocent.

The law of blockade is so clear that while a few citations may be given for the sake of illustration, they seem to us hardly necessary.

Kent says:

The law of blockade is, however, so harsh and severe in its operation, that in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had due previous notice of its existence; and the squadron allotted for the purpose of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade amounts to an entire defeasance of the measure, even though the notification of the blockade has issued from the authority of the Government itself. A blockade must be existing in point of fact, and in order to constitute that existence, there must be a power present to enforce it. All decrees and orders declaring extensive coasts and whole countries in a state of blockade, without the presence of an adequate naval force to support it, are manifestly illegal and void, and have no sanction in public law. The ancient authorities all referred to a strict and actual siege and blockade. The language of Grotius is *oppidum obsessum vel portus clausus*, and the investing power must be able to apply its force to every point of the blockaded place, so as to render it dangerous to attempt to enter, and there is no blockade of that part where its power can not be brought to bear. (Vol. 1, pp. 144-5.)

The United States have contended that a blockade must be effective to be valid (note b. to Kent, vol. 1, p. 145), and admitted the principle even as to its own ports during the late war. This question has been very ably discussed in a late note from the Secretary of State, Mr.

Bayard, to the minister representing the United States of Colombia, in which, after citing authorities, the Secretary reaches the following conclusions:

After careful examination of the authorities and precedents bearing upon this important question, I am bound to conclude as a general principle that a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extraterritorial effect in the direction of imposing any obligation upon the Governments of neutral powers to recognize it or to contribute toward its enforcement by any domestic action on their part. Such a decree may indeed be necessary as a municipal enactment of the state which proclaims it, in order to clothe the executive with authority to proceed to the institution of a formal and effective blockade, but when that purpose is attained its power is exhausted. If the sovereign decreeing such closure have a naval force sufficient to maintain a blockade, and if he duly proclaims such a blockade, then he may seize, and subject to the adjudication of a prize court, vessels which may attempt to run the blockade. If he lay an embargo, then vessels attempting to evade such embargo may be forcibly repelled by him if he be in possession of the port so closed. But his decree closing ports which are held adversely to him is, by itself, entitled to no international respect. Were it otherwise, the *de facto* and titular sovereigns of any determinate country or region might between them exclude all merchant ships whatever from their ports, and in this way not only ruin those engaged in trade with such states, but cause much discomfort to the nations of the world by the exclusion of necessary products found in no other market. (Note, dated April 24, 1885. See also Hall, *International Law*, §§ 257 and 260; 3 Phillimore, 311 and 516; case of *The Sarah Star*, Blatchford's Prize Cases, 69-87; Lawrence's Wheaton, pp. 575 *et seq.*)

Sir William Scott thus laid down the rule:

To constitute a violation of blockade three things must be proved: First, the existence of an actual blockade; second, the knowledge of the party supposed to have offended; and, third, some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade. (*The Betsey*, 1 Rob. Adm., p. 92. As to Berlin and Milan decrees see Woolsey, § 206.)

Therefore to justify seizure the blockade must be effective, notice must have been given, and there must be an attempt to violate it.

Was Martinique effectively blockaded?

Defendants have referred us to no authority to show that it was, and we have made such examination as the sources of historical investigation on this subject afforded without finding any statement to that effect. The records of the numerous spoliation cases in this court which have been brought to our attention throw no light on the subject, as they proceed upon the fact that the condemned vessel was bound to an enemy port or laden with enemy produce and the condemnations rest upon French decrees.

An examination of the history of Anglo-French naval operations directly affecting the West Indies discloses the following events:

February 2d, 1794, an English expedition sailed from the Barbadoes to attempt the capture of Martinique, then under the command of General Rochambeau. This expedition consisted of three ships of the line, eight frigates, four sloops, two store-ships, and one bomb, under command of Vice-Admiral Sir John Jervis, carrying something less than 6,100 troops, commanded by Lieutenant-General Sir Charles Grey. The French garrison was insignificant in number, consisting only of some 600 men, including 400 militia, while at Fort Royal was a 28-gun frigate, and at St. Pierre an 18-gun corvette. Possibly a privateer or two was also available. The British arrived off the island the 5th of February, and some idea may be gained of the heroic defense of the French from the fact that with the overwhelming force at their command the British did not obtain a surrender until the 22d of March. The forts were garrisoned, Lieutenant-General Prescott was given command, a small squadron, under Commodore Thompson, was left to cooperate with him in case of attack, and the rest of the expedition embarked the 31st March to attack St. Lucie (James' Naval History, vol. 1, pp. 217 *et seq.*), which surrendered without the loss of a life upon the 4th of April. Then followed the conquest of Grande-Terre, another expedition having taken the three small islands adjacent to Guadeloupe, called the "Saintes," and on the 20th April all Guadeloupe and its dependencies surrendered, comprising the islands of Marie Galante, Désirade, and the Saintes, at an expense of two British rank and file killed, four rank and file wounded, and five missing. A French 16-gun corvette was captured in this expedition, but was not deemed fit for service.

Early in June a French squadron of two frigates, one corvette, two large ships armed *en flûte*, and five transports anchored off the village

of Gosier, Guadeloupe, and began disembarking troops commanded by Victor Hugues, bearing the title of *commissaire civil*. After skirmishes with the British garrison and French royalists, in which Hugues's troops were successful, a considerable force of vessels and men were sent by the British to dislodge them. The result was the withdrawal of the British from Grande-Terre the 3d July, just one month after Hugues's arrival. In October the French received reinforcements, took Basse-Terre, and the 6th October, 1794, were again masters of Guadeloupe, except a small port called Fort Matilda, which, so tenacious was the resistance, they did not capture until December 10. At the close of the preceding year the British had obtained possession of Cape Nicolas Mole, Jérémie, and other French villages in San Domingo, and in February, 1794, other places on the island fell into their hands after trifling resistance. In May a strong force was sent by the British against Port au Prince, which surrendered June 4. In December the British post at Cape Tiburon was attacked and captured by French troops, assisted by three armed vessels (*ibid.*). As soon as news of Hugues's victory reached France there were dispatched to his assistance a 50-gun frigate, a 36-gun frigate, two corvettes, an armed ship or two, and eight or ten transports with 3,000 troops and suitable stores.

The arrival of this important reinforcement inspired Victor Hugues with designs against the other ceded islands. Having not only troops, but transports to convey and ships of war to protect them, this demon of republicanism, whose barbarity, as fully accredited on several occasions, was of the most revolting description, readily contrived to land soldiers at Sainte Lucie, St. Vincent, Grenada, and Dominique. Artful emissaries accompanied the troops, and soon succeeded in raising a ferment in the islands which they visited. The negroes, Caribs, and many of the old French inhabitants revolted; and dreadful were the atrocities perpetrated upon the well affected. . . . The British troops, thinly distributed from the first and since reduced by fatigue and sickness, could offer in general but a feeble resistance to the numbers of different enemies opposed to them. The garrison at Sainte Lucie, numbering 2,000 men, evacuated the island on the 19th of June (1795). By the 27th of June the "rebellion" in Dominique had been quelled "by the few British troops stationed there, assisted by the bulk of the inhabitants," St. Vincent and a part of Grenada remaining in a revolted state. (*Ibid.* 298 *et seq.*)

In April and May, 1796, the English took, without conflict, the Dutch settlements of Demerara, Essequibo, and Berbice. On the 24th May, after a stubborn combat of over a month, Sainte Lucie was captured by the British troops and vessels. June 11 St. Vincent surrendered, as a few days later did Grenada. So far as appears the French had no armed ships at either of these islands. In the preceding March the British made an unsuccessful attack upon the town and fort of Léogane, San Domingo, and a successful one upon the fort and parish of Bombarde. No French ships appear in these actions, but a squadron arrived at Cape François May 12, but returned immediately to France. (*Ibid.* 367 *et seq.*)

February, 1797, a British squadron left Port Royal, Martinique, for the purpose of attacking the Spanish colonies. Trinidad soon fell into their hands, and, touching at Martinique on the way, the squadron proceeded to Porto Rico, the attack upon which was unsuccessful. In April the French 36-gun frigate *Harmonie* was destroyed by the English near Jean Babel, while sailing under orders to convoy to Cape François, from Port au Prince and Jean Babel, a number of provision-laden American vessels captured by French privateers. An action between three of the British fleet, a French privateer, and a French battery in Carcasse Bay, is the only other engagement noted as having taken place in the West Indies during this year. (*Ibid.*, vol. II, pp. 97 *et seq.*)

The year 1798 opened with the evacuation by the British in April of Port au Prince, St. Marc, and Arcahaye, all in San Domingo, shortly after which three French 36-gun frigates landed supplies at Cape François and returned home. An engagement between the British and Spanish was the only other important naval event of this year in the Gulf. In August, 1799, the British took the Dutch island of Surinam, finding in the river a French corvette, the *Hussar*, which was added to the British navy. (*Ibid.*, p. 373.) September 13, 1800, the island of Curaçao surrendered to the British, and forty-four vessels were found lying in the harbor, but no warships. (*Ibid.*, vol. III, p. 59.)

In May, 1793, the *Hyena*, of 24 guns, and *La Concorde*, of 40 guns (the advance frigate of a French squadron of some six vessels), had an engagement off Cape Tiburon, which resulted in the defeat of the former. In July the English frigate *Boston*, after capturing the first lieutenant of the French frigate *Embuscade*, then lying in the harbor of New York, challenged the Frenchman to battle, a challenge

which was accepted; the battle took place without decided result, and during it what was supposed to be a large French squadron appeared in the offing, while two French frigates were afterwards found by the *Boston* lying in the mouth of the Delaware, where she sought refuge. In November a combat took place between *Penelope* and *Iphigenia* on the one side and the *Insurgente* on the other, in the bight of Léogane, island of San Domingo, resulting in the defeat of the French frigate. (*Ibid.*, vol. I, pp. 88 *et seq.*)

In December, 1794, the British frigate *Blanche*, cruising off the island of Désirade, a dependency of Guadeloupe, then in French possession, cut out a government armed schooner of 8 guns, which, to escape, had anchored in the bottom of the bay of Désirade. Later the *Blanche* had an encounter with the French 36-gun frigate *Pique* off Point-à-Pitre, in which, after a battle most gallant on both sides, the *Pique* was captured. In May there was a battle in Chesapeake Bay between two English frigates and five lightly armed Frenchmen, most of them store-ships. (*Ibid.* 277 *et seq.*)

On the 4th of May, 1796, the *Spencer* engaged and captured the French gun-brig *Vulcan* in latitude 28° north, longitude 69° west.

In July, 1796, a combat without definite result took place between the frigates *Aimable* (English) and *Pensée* (French), beginning off "Englishman's Head," Guadeloupe, while in August the *Mermaid* attacked the *Vengeance* within gun fire from Guadeloupe batteries, and in July the *Quebec* was chased by two French frigates when not far from Port au Prince.

August 25, 1796, the British 20-gun ship *Raison* engaged the *Vengeance*, the *Mermaid's* former opponent, in latitude 41° 39' north and longitude 66° 24' west, without definite result. Later in the same month an English squadron captured the French frigate *Elizabeth* off Cape Henry. In September the *Médée* engaged the *Pelican* off Guadeloupe. The action had no definite result, and it appears that at this time the *Thetis* (French) and either the *Pensée* or the *Concorde* were at anchor in Guadeloupe. The *Pelican* was so much inferior to the *Médée* in armament that Hugues sent an aide-de-camp under a flag of truce to the *Saintes* to inspect her as she lay there at anchor.

On the 10th August, 1797, the 38-gun British frigate *Arethusa*, captured, after stern resistance, the French corvette *Gaieté*, sighting at about the same time the brig-corvette *Espoir*, of 14 guns, and a third vessel supposed to be a small French war vessel. Five days later the

Alexandrian, schooner of 6 guns, acting as tender to the flag-ship at Martinique and engaged in quest of French privateers, captured a privateer schooner and chased another, which escaped. September 17 the *Pelican* destroyed the French privateer *Trompeuse* off Cape St. Nicolas Mole. On the 4th October the *Alexandrian* captured the French privateer *Epicharis*. January 3, 1798, the British armed sloop *George*, of 6 guns, while on a passage from Demerara to Martinique, was captured by two Spanish privateers. Thirteen days later boats from the 20-gun ship *Babet*, then cruising between Martinique and Dominique, captured the French armed schooner *Desirée*. April 17 the British schooner *Recovery*, cruising in the West Indies, fell in with the privateer *Revanche* and compelled her to surrender. May 7 the British brig sloop *Victorieuse*, while passing to leeward of Guadeloupe, was attacked without success by two French privateers. The same vessel during the following December, aided by the 14-gun brig-sloop *Zephyr* and some troops, after an attack upon the Spanish in the island of Margarita, took out the privateer *Couleuvre*, of 6 guns and 80 men, from the port of Gurupano. July 11 boats from the British 44-gun ship *Regulus* cut out three vessels at anchor in Aquada Bay, Porto Rico. December 11 the British 22-gun ship *Perdrix* captured the French privateer *Armée d'Italie* not far from St. Thomas.

March 30, 1799, boats from the British frigate *Trent* and cutter *Sparrow* cut out a Spanish merchant ship and schooner which they found in a bay of Porto Rico, at the same time storming and carrying a small Spanish battery. April 13, the *Amaranthe*, a British 14-gun brig-sloop, captured the French letter-of-marque schooner *Vengeur* after the latter had made a noble resistance.

The officers and crew of the *Abergavenny*, stationary flag-ship at Port Royal, tired of inaction during the whole of 1797 and part of 1798, fitted out on their own account a frigate launch which was so successful in prize-taking that its proprietors were enabled to purchase with their prize money a small schooner named the *Ferret*, which became the tender of the *Abergavenny*. The *Ferret* early in October, 1799, had a very sharp encounter with a Spanish privateer without decisive result. Later in the same month the British brig-sloop *Echo* cruising off Porto Rico, chased a French letter-of-marque into Laguadille bay and cut her out, and not long after occurred the daring capture of the *Hermione* in the harbor of Puerto Cabello. In November the *Crescent* and *Calypso* adroitly saved their convoy from

a Spanish squadron. Still later in that month the *Solebay*, cruising off San Domingo, encountered a French squadron recently arrived at Cape François from France and bound to Jacmel. Strange to say, this 32-gun frigate captured all the French vessels without casualty on either side. The squadron consisted of four vessels mounting 58 guns, manned with 431 men, while the frigate carried 38 guns and about 212 men. In December an indecisive conflict took place off the island of Porto Santo between the *Glenmore* and *Amiable* in charge of an outward bound British West India convoy, and the *Sirene* and *Bergère* bound from Rochelle to Cayenne with 450 troops and Victor Hugues on board. (James, Vol. II, pp. 79 *et seq.*; 198 *et seq.*; 313 *et seq.*) Early in April, 1800, boats from the sloop *Calypto* off Cape Tiburon, carried the French privateer *Diligente*. In August the British 38-gun frigate *Seine*, cruising in the Mona passage, sighted the *Vengeance*, bound from Curaçao to France, which, after a sharp combat, surrendered. In October the schooner *Gypsie* (British) cruising off Guadeloupe, captured the *Quidproquo* of 8 guns. (James, Vol. III, pp. 27 *et seq.*)¹

We have now set forth in this catalogue at somewhat tedious but necessary length every naval action (except some few unimportant combats with privateers) of which we can find record, which took place from 1793 to 1800, both years inclusive, between British and French or Spanish naval forces, on or near the eastern coast of America, between the latitude of Boston and the northern coast of South America. The reason for so voluminous a list, which, while probably not without omissions, we believe to be sufficiently correct, is that from it alone can any conclusion be drawn as to the amount of the French naval force and its uses during the period in dispute. For convenience to those whose interest or duty it may be to investigate this question we have cited but from one authority, and one which, while not without fault of national prejudice, is carefully and conveniently compiled. Other authorities examined by the court reinforce the conclusions we draw from the citations already made.

Martinique it is alleged was effectively blockaded. This is not affirmatively shown, and perhaps we might rest here, but in this class of cases we have thought it right to go further and to endeavor to throw all the light in our power upon the exact situation.

¹Consult also Life of Decatur, Sparks' series of Biography, 31; Cooper's Naval History United States, Vol. I.

From the citations made and also from the history of the American Navy certain facts clearly appear as worthy of notice.

First, the very small number of encounters between vessels of the English navy and French vessels of war.

Second, that no such encounter took place near Martinique, the two captures of privateers by the *Alexandrian* being the only combats mentioned as occurring in the vicinity of that port after its occupation by the English.

Third, that not a word is said, or an allusion made, in any attainable authority as to a blockade or an attempted blockade (in fact) of any West Indian English port. It does not appear that any armed vessel, English or American, was ordered to, or attempted to, break any such blockade, although the English force was at times very large in the West Indies and was actively engaged. Neither in Cooper's Naval History nor in the Life of Decatur, nor in any other work relating either to the English or American Navy which we have been able to consult, nor in the diplomatic correspondence of the period, do we find any statement tending to show that there existed anything other than a paper blockade, a blockade useless and void in so far as neutral rights were affected.

Further proof of this absence of effective blockade is found in the large number of merchant vessels which safely traded with these ports during the period in question, and in the lack of contention on the part of France, notwithstanding Mr. Pickering's vigorous language (Doc. 102, pp. 408, 410), that they were maintaining or endeavoring to maintain an effective blockade.

We have already seen that the French Government did not desire the fulfillment of the treaty's guaranty clause, deeming it wiser on their own account that we should not embark in the war. Genet and the colonists complained of our course on this subject, but the home government did not agree with them. As late as March, 1798, Talleyrand wrote to Pinckney and his colleagues that "the Republic was hardly constituted when a minister was sent to Philadelphia, whose first act was to declare to the United States that they would not be pressed to execute the defensive clauses of the treaty of alliance, although the circumstance, in the least equivocal manner, exhibited the *casus fœderis*" (4 Wait's Am. State Papers, p. 97). We find no claim by France that the treaty was abrogated by a failure by the United States to fulfill the guaranty clause. During and soon after

1794 the West India Islands fell into the hands of Great Britain, yet in 1795 (January 3) a French decree reciting the law of December, 1794, ordering the treaties of 1778 to be respected as in force, declared, in favor of the United States, the principle of free ships, free goods, except as to ports actually blockaded. As against this position of his superiors, Hugues, in February, 1797, issued his order subjecting to capture and confiscation vessels and cargoes destined to the captured islands, giving as a reason the failure of the guaranty.

The fact, then, that some of the West India Islands had been taken from France does not seem to complicate the legal question.

It is urged that provisions bound for Martinique were properly condemned, on the ground, substantially, that as the port was in possession of an enemy force, it must be assumed they were intended to feed that force, and therefore were contraband by destination. (Citing *The Peterhof*, 5 Wall. 58; 2 Black, 671 and 672, "The Prize Cases"; Desty on Shipping, § 423; Letens Droits. Recip., p. 114; Blatchford's Prize Cases, p. 464.)

As far back as Grotius the distinction was made between things useful only for war, the carriage of which by neutrals is prohibited, things which serve merely for pleasure, the carriage of which is permitted, and things useful both in peace and war, as money or provisions, which are sometimes lawful articles of neutral commerce, and sometimes not, according to the circumstances existing at the time. Thus provisions would be contraband if bound to a besieged camp or port. Kent, who seems to be the most liberal of the writers towards defendants' position, thus lays down the rule:

The modern established rule is, that provisions are not generally contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is that they are the growth of the country which produces them. Another circumstance to which some indulgence is shown by the practice of nations is when the articles are in their native and manufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered as so objectionable a commodity, when going to an enemy's country, as any of the final preparations of it for human use. The most important distinction is, whether the articles were intended for the ordinary use

of life or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going is not an irrational test. If the port be a general commercial one, it is presumed the articles are going for civil use, though occasionally a ship of war may be constructed in that port. But if the great predominant character of that port, like Brest in France, or Portsmouth in England, be that of a port of military naval equipment it will be presumed that the articles were going for military use, although it is possible that the articles might have been applied to civil consumption. As it is impossible to ascertain positively the final use of an article *incipit usus*, it is not an injurious rule which deduces the final use from the immediate destination, and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful. (Vol. I. p. 139.)

The Supreme Court has decided that provisions the growth of the enemy's country, but the property of a neutral, and carried in a neutral vessel, are good prize because destined to supply the enemy's forces; and the court added that provisions are not generally contraband, but may become so because of their destination or the particular situation of the war. If intended for the ordinary use of life, they are innocent; if intended for the enemy's forces or his ports of warlike equipment, then their seizure is justifiable. (*The Commercen*, 1 Wheaton, 382.)

Bluntschli thinks it against "*gute sitte*" to treat trade in provisions as contraband even if it serves the hostile army's use (*Mod. Völkerrecht*, § 807). Heffter (*Europäisches Völkerrecht*, § 160) holds that belligerents may take measures against the export by neutrals of doubtful articles, articles occasionally contraband, only when a destination for the enemy's Government and military forces can be shown on adequate grounds. Ortolan denies that provisions and objects of prime necessity may be considered contraband, except in cases not pertinent to this discussion (Vol. II, 179). Hautefeuille goes much further and admits as contraband only arms and munitions of war ready for immediate use, fit to be used as such and for no other purpose. (*Droits des Nations Neutres*, II, 419.)

Klüber leans the same way and holds that presumptions are in favor of freedom of trade (§ 288), and Martens states that the law in Eu-

rope prior to the first armed neutrality, 1780, considered as contraband only articles of direct use in war. Vattel sanctions the seizure of provisions "in certain junctures when we have hopes of reducing the enemy by famine" (Liv. III, ch. 7, sec. 112), but Wheaton believes he intended to carry the principle no further than to the case of a besieged city; and, commenting on Grotius, Wheaton reaches the conclusion that the latter sanctions the seizure of provisions, not bound to a port besieged or blockaded, only when made for preservation or defense "under the pressure of that imperious and unequivocal necessity which breaks down the distinctions of property," and this power should not be exercised until all other possible means have been used, then not if the right owner is under a like necessity, and even then restitution shall be made as soon as possible. Bynkershoek and Rutherford concur in this view. (Wheaton, pp. 556 to 558.)

Wheaton expresses no definite opinion for himself, but clearly leans to the side of freedom towards the neutral.

In 1793 (May 7), Mr. Jefferson instructed Mr. Pinckney in relation to a fear expressed by the latter that the belligerent powers might stop our vessels going with grain to enemy ports, that "such a stoppage to an unblockaded port would be so unequivocal an infringement of the neutral rights that we can not conceive it will be attempted." This instruction was followed by another dated September 7, 1793, in which Mr. Jefferson, after stating that in time of war neutrals are free to pursue their ordinary avocations of agriculture, manufacture, and commerce, with the exception of not furnishing to either belligerent "implements merely of war for the annoyance of the other, nor anything whatever to a place blockaded by its enemy," proceeds to define these "implements" as follows:

There does not exist perhaps a nation, in our common hemisphere, which has not made a particular enumeration of them in some or all of their treaties under the name of contraband. It suffices for the present occasion to say that corn, flour, and meal are not of the class of contraband, and consequently remain articles of free commerce. A culture which, like that of the soil, gives employment to such a proportion of mankind, could never be suspended by the whole earth, or interrupted for them, whenever any two nations should think it proper to go to war. . . . If any nation whatever has a right to shut up to our produce all the ports of the earth except her own and those of her friends, she may shut up these also, and so confine us within our own limits. No nation can subscribe to such pretensions; no nation can agree,

at the mere will or interest of another, to have its peaceable industry suspended and its citizens reduced to idleness and want. . . . It is not enough for a nation to say we and our friends will buy your produce. We have a right to answer that it suits us better to sell to their enemies as well as their friends. Our ships do not go to France to return empty. They go to exchange the surplus of one product which we can spare for surpluses of other kinds which they can spare and we want; which they can furnish on better terms and more to our mind than Great Britain or her friends. We have a right to judge for ourselves what market best suits us, and they have none to forbid us the enjoyment of the necessities and comforts which we may obtain from any other independent country.

Mr. Randolph, denying that food can be universally ranked "among military engines," admitted that corn, meal, and flour are so in case of "blockade, siege, or investment." In the late Franco-Chinese war France endeavored to make "rice" contraband, and, referring to this contention, Mr. Kasson, our minister in Berlin, wrote as follows to the Secretary of State:

. . . But more especially I beg your attention to the importance of the principle involved in this declaration, as it concerns our American interests. We are neutrals in European wars. Food constitutes an immense portion of our exports. Every European war produces an increased demand for these supplies from neutral countries. The French doctrine declares them contraband, not only when destined directly for military consumption, but when going in the ordinary course of trade as food for the civil population of the belligerent government. If food can be thus excluded and captured, still more can clothing, the instruments of industry, and all less vital supplies be cut off on the ground that they tend to support the efforts of the belligerent nation. Indeed, the real principle involved goes to this extent, that everything the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war. The entire trade of neutrals with belligerents may thus be destroyed, irrespective of an effective blockade of ports. War itself would become more fatal to neutral States than to belligerent interests.

The rule of feudal times, the starvation of beleaguered and fortified towns, might be extended to an entire population of an open country. It is a return to barbaric habits of war. It might equally be claimed that all peaceful men of arms-bearing age could be deported, because otherwise they might be added to the military forces of the country.

Martinique was neither blockaded nor besieged. It undoubtedly had a British garrison and was a refuge and sometimes a rendezvous for British armed vessels; at the same time it had a large civil population to be fed then, as it is now, largely by the products of the temperate zone. Its predominant character was not that of a port of naval or military equipment.

We do not consider that a provision-laden ship bound for Martinique was properly condemned on the ground alone that she was bound to a British port, nor do we consider the fact that the port had once been French complicates the situation. There is nothing in the law of nations which justifies or makes valid as against neutrals such decrees as those issued during this war by the French and English. Russia admitted these decrees were contrary to the law of nations. France promised to pay for captures made under them. England and Spain did pay the United States. (See authorities cited in *Gray, Adm'r, v. U. S.*, 21 C. Cls. 340.) If either party desired to reduce the other by starvation there was a plain and acknowledged legal method to obtain that end; that is, by the establishment of an effective blockade. That neither was able to take this course, is not a reason that the commerce of neutrals should be suspended on the penalty of having their merchant vessels and cargoes confiscated. To admit such a doctrine would be to impose in time of war a worse burden upon the neutral than that borne by either belligerent, and would shut it up in its own ports, or oblige it to furnish, in protection of its commerce, a naval force competent to compete with the belligerent, which by paper decrees unsupported by effective acts, by its municipal law attempts to interfere with the recognized and natural rights of neutral trade.

We do not understand that in the negotiations of 1800 the French denied the justice of claims similar in principle to the one now suggested, and the treaty of 1778 in terms conceded the right to trade with the enemy. The commerce of the United States was principally in agricultural products, certainly not in munitions of war. A most important complaint was as to that part of the belligerent decrees which directed seizure of neutral property on the sole ground of destination to an enemy port without regard to the character of the cargo. (See *Treaty Commerce 1778*, Articles XII, XIII, XXIII, XXIV.)

It seems to us clear that this class of claims was contemplated by the treaty of 1800 and the act of 1885.

The burden of proof in prize proceedings is on the seized vessel. The authorities concur in this general statement, but the principle is not technical and is not to be pushed beyond its proper natural intent. Seized vessels always appear before the court under the taint of suspicion; that taint it is incumbent upon them to remove, as it is in their power alone to do so. What the court looks for is the fact. If it appear that the vessel was innocently pursuing an honest and legal voyage, whether that appear by papers or otherwise, then the vessel should be released. No particular papers, no specified character of evidence is marked out and defined as indispensable to attain this end. A case is easily supposable in which a merchant vessel has lost its papers by an accident, or by theft, or by robbery committed by a pirate or privateer, or through suppression by the captor, and it would not be admitted—the fact of their non-production being explained, and the vessel's honest character being shown—that because some particular document was not on board she therefore should be condemned and confiscated. The *onus probandi* is on the captured vessel; which means no more than that she must explain away suspicious circumstances.

The learned counsel for the defense contend that the United States first violated the treaties of 1778 by the proclamation of neutrality of 1793, by refusing to guarantee the French possessions, by refusing to grant the promised harbor privileges, and by concluding the Jay treaty. Therefore "it was the right of France to retaliate upon the United States for these violations; and whatever she did, or whatever was done by her authority in such retaliation prior to and during the limited war existing between the two countries, whether by captures, seizures, condemnations, or confiscations of American property, vessels or cargoes, was justifiably done."

In another form substantially the same contention is made, defendants claiming that the acts of France complained of by the United States were authorized by the law of nations; that whether reparation was to be made by France depended upon compliance with her demands; that as the United States did not acquiesce in those demands, but by the annulling act of July, 1798, practically notified France that they would not do so, "from that moment France owed no compensation for those confiscations and the matter was *res judicata*."

In considering these propositions it will strike any one who has studied the correspondence or will refer to the extracts made from

it by us in this and our previous opinions on the spoliations question, that France never took this point. It will be remembered that the decrees at the outset were admitted by all parties to be illegal, and excusable only on the ground of necessity; that while this admission was not by any means consistently adhered to, still England and Spain came back to it in effect when they compensated the United States for losses—England through a commission organized under the provision of the Jay treaty, Spain in the treaties relative to the Florida purchase.

France did not seriously ask us to enforce the guaranty and apparently did not wish us to do so, however much we may have feared such a demand on her part, and however much some of her agents and her colonists may have desired it. The vital point of difference was the Jay treaty. We have already discussed that instrument and stated that it was in conflict with the provisions in the Franco-American treaties of 1778. France did not contend that the Jay treaty abrogated the treaties of 1778; on the contrary, her whole argument, down to the ratification of the treaty of 1800, was based upon the premise that these treaties were of enduring force. The decree itself which ordered seizure of neutral property bound in United States vessels to enemy ports, set forth as a reason for its enactment that the Jay treaty modified, not annulled, the treaties with France, and that France was entitled under the treaties to any benefit this modification might give her.

France did not deny at any point of the negotiations which led to the treaty of 1800 her liability for claims known by the generic name of "spoliations," but claimed in return for payment recognition of treaties, a demand which was not granted, and the contention remained embodied in the second article, which was stricken out. Thus was completed what Madison called the "bargain" by which we released "spoliations" in consideration of release from all obligations founded upon the treaties of 1778. A striking illustration of the French position, if any is needed after the detailed statement of the negotiations which has heretofore been made, is found in Article IV of the treaty of 1800, which agrees to return prizes captured under the decrees, now termed by the defense decrees of retaliation, when those prizes had not been already definitively condemned.

Acts of retaliation are admitted to be justifiable under certain circumstances. They may exist when the two nations are otherwise at

peace, but they are in their nature acts of warfare. They depart from the field of negotiation into that of force, and, as is war, are justified by a successful result. To term the decrees of France and the acts of their privateers under them "acts of reprisal" does not alter the facts or the legal position. That position has been defined by the Supreme Court of the United States as limited partial war. We, following the path indicated by that tribunal, have defined it as "limited war in its nature similar to a prolonged series of reprisals." The result of that partial limited war, the result of the negotiations for settlement, the agreement reached by the two parties which made the Government of the United States liable over to its citizens, we have heretofore considered so much in detail that we shall not now repeat it, and we need only state briefly the result heretofore reached by us, and in which we, after reexamination, are confirmed, that the acts of France, now in question, whether called "reprisals" or acts of limited warfare, were contended by the United States to be illegal, were admitted so to be by France; that France stood ready to make the compensation made by England and Spain for similar acts on their part, provided we would admit certain claims of her own, which we declined to do; and finally, by the substitution of the existing second article of the treaty for that agreed upon by the negotiators, these claims were surrendered in consideration of a release from the French demand.

The case of the *Two Brothers* presents a claim for salvage paid an American man-of-war for rescue from a French privateer.

The broad principle of prize law forbids an allowance by way of salvage to the captor of a neutral in possession of a belligerent. The reason of the rule is plain: salvage is remuneration for aid in case of danger, and a neutral vessel in the hands of a civilized belligerent is not in danger, for it is to be presumed that, if innocent, she will be discharged by the prize-court with damages for detention. Some of the prize-courts in France were at certain times during the disturbed period between 1792 and 1801 very fair and just in their treatment of neutral property. We have in our opinions on the spoliations cited instances of a reasonable judicial application of the law. Unfortunately, however, the fair administration of justice, which before the Revolution and since has characterized the learned and able officials who have there filled the offices of the magistrature, was interrupted during the period now under consideration. Setting aside the charges made of ulterior and improper motives on the part of individual magis-

trates of which illustrations are found in the letters of Monroe, Mountflorencia, and Pickering (*supra*), we need only to recall that the decrees of the French or colonial governments were binding upon the prize tribunals, and those tribunals were obliged to enforce them. Many of the decrees were in conflict with the law of nations and were an invasion of the rights of neutrals. The position assumed by the French authorities placed neutrals prosecuting innocent voyages in a most dangerous position. If taken by a French privateer they were not to expect a trial under the recognized law of nations, but a trial under arbitrary and illegal municipal enactments; a trial which would necessarily result in condemnation, even if the local tribunal were above suspicion of improper prejudice.

Under these circumstances the reason fails for the rule as to salvage in case of recapture of a neutral from a belligerent. As the neutral was in danger of condemnation, so the recapturing vessel was entitled to salvage. We have already cited the opinion of Lord Stowell, who, at the time of the occurrences from which these claims arose, found it just and necessary to adopt this rule.

The Supreme Court of the United States have declared that to support a demand for salvage two circumstances must concur—the taking must be lawful, and there must be a meritorious service rendered to the recaptured. Commenting on Lord Stowell's opinion as to the necessity for meritorious service, the court say:

The principle is that without benefit salvage is not payable; and it is merely a consequence from this principle which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say that no benefit is conferred by a recapture. In such a course of things the state of the neutral is completely changed. So far from being safe, he is in as much danger of condemnation as if captured by his own declared enemy. A series of decisions, then, and of rules founded on his supposed safety, no longer apply. Only those rules are applicable which regulate a situation of actual danger. This is not as it has been termed, a change of principle, but a preservation of principle by a practical application of it according to the original substantial good sense of the rule.

The court then inquire whether the laws of France were such as to have rendered the condemnation of a neutral in possession of a French

prize crew so probable as to create a case of such real danger that her recapture must be considered as a meritorious service authorizing allowance as salvage. On this point the conclusion is reached that the danger of loss was real and imminent.

The captured vessel was of such description that the law by which she was to be tried condemned her as good prize to the captor. Her danger then was real and imminent. The service rendered her was an essential service, and the court is therefore of opinion that the recaptor is entitled to salvage. (*Talbot v. Seeman*, case of the *Amelia*, 1 Cr. 1.)

We see no reason why a rule laid down by such eminent authority, so just in principle, and the result of such sound judicial reasoning, should not be applied to the cases now before us.

The *Nancy* was under charter to sail from Baltimore to Jamaica, there to discharge cargo, reload, and return to Baltimore. While on her way to Jamaica under this charter-party she was seized on the high seas by a French privateer and lost to her owners. The question is now presented as to the basis upon which an allowance for freight should be computed.

It is evident that freight earned is an element of value in the property lost. The ship-owner has a right to expect a reasonable return upon his venture, and this return he finds only in the freight money. As between the vessel and the cargo-owner the freight is regarded as an entirety due in no part until the arrival of the vessel at the port of destination. Between these two alone does this rule prevail—as to them the law has placed a certain construction upon the contract of affreightment to which they are parties—a construction well understood, admitted, and certain. As to third parties no such rule prevails, and, as against them freight is often recoverable, even when the vessel does not reach her destination. In cases of tort, such as collision, Dr. Lushington says: “The party who had suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain for the detention of the vessel during the period which is necessary for the completion of the repairs, and furnishing the new articles (2 W. Robinson, 279), and he allowed gross freight, less the ordinary ship’s expenses necessary to earn it. As a broad rule this is well enough, but it is not without possible exception, for we may imagine an injury at a time when the vessel is not engaged in freight

earning, although even then we probably look to the market for a proper measure of damages.

The case of *The Amiable Nancy* (3 Wheaton, 560), and *Smith v. Condry* (1 How. 35), allowed only the "actual damage sustained by the party at the time and place of injury" without allowance for detention. In *Williamson v. Barrett* (13 Howard, 101), a collision case, the court allowed damages for demurrage, adopting the rate of freight, less expenses, as a proper measure, three justices dissenting on the ground that the majority rule introduced too much uncertainty into the case and tended to increase the "stringency, tediousness, and charges of litigation in collision cases." They therefore preferred a rule granting full damages at the time and place of collision, with legal interest on the amount thus ascertained.

The case of the *Baltimore*, arising from collision, was decided in 1869 (8 Wall. 377), the court holding that the suffering party is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention. *Restitutio in integrum* is the leading maxim in such cases, say the court, and in respect to materials for repairs where repairs are practicable there shall not, as in insurance cases, be any deduction for new materials in place of old, for this reason that "the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indemnity is not limited by any contract, but is coextensive with the amount of damage. . . . Allowance for freight is made in such a case reckoning the gross freight less the charges which would necessarily have been incurred in earning the same, and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of the voyage."

In case of capture the general rule is that the neutral carrier of enemy's property is entitled to his freight (Story, J., in *The Commercen*, 1 Gallison, 264). Sir William Scott held very firmly by this rule in the case of *Der Mohr* (3 C. Rob. 129, and 4 C. Rob. 315), a case of great hardship, appealing strongly to the sympathy of the court. In that case, he said:

In an unfortunate case like the present, the court would certainly be disposed to give the captor all possible relief. I need not add that no relief is possible which can not be given consist-

ently with the justice due to the claimant. The demand of freight is, I apprehend, an absolute demand, in cases where the ship is pronounced to be innocently employed. . . . The freight is as much a part of the loss as the ship, for he (the captor) was bound to answer equally for both. The captor has, by taking possession of the whole cargo, deprived the claimant of the fund to which his security was fixed. He was bound to bring in that cargo subject to the demand for freight. He was just as answerable for the freight of the voyage as for the ship which was to earn it, or which was rather to be considered as having already earned it. In the room of this fund the captor has substituted his own personal responsibility, for loss accrues by the fault of his agent. I see no distinction under which I can pronounce that the claimant is not as much entitled to the freight as to the vessel. (See also 1 Gallison, 274, the *Anna Green*.)

Upon an open insurance policy gross freight is recoverable (2 Phillips, Ins., § 1238). As to insurance, the inchoate right to freight vests directly "the ship has broken ground on the voyage described in the charter-party," and there is an insurable interest "where there is an expectancy coupled with a present existing title" (*Lucena v. Crawford*, 2 Bos. and Pull. N. R. 269; 1 Phillips, Ins., § 334, p. 192.)

Freight, then, is property insurable and collectible. It has value although the right as against the freighter may be inchoate until delivery. As to the freighter the ship-owner is without redress, unless there be delivery in accordance with the contract, but as to an insurer or a tort-feasor, there is a right to redress upon the happening of an interruption of the voyage. The amount of that redress and the method of computing it in the cases now submitted to us of illegal capture are now to be decided. The ship-owner has a right to a reasonable return upon his investment, for the risk to which his property is subjected, for its depreciation while engaged in the undertaking, and for the expenses to which he is subjected in carrying it out. The measure of that return, based upon the theory of a completed voyage, he has himself fixed in his contract of affreightment. If his voyage be not completed, but be interrupted and his property lost by the act of a wrong-doer, then, as against that wrong-doer, the maxim *restitutio in integrum* applies. If the voyage were completed the difficulty would not be serious, for as a guide we should have a contract made by parties opposed in interest and familiar with the business. As the voyage has not been completed, an allowance of gross freight would be more than a *restitutio in integrum*, and would neglect a deduction.

for expenses necessarily to be incurred in completing the contract and in conveying the cargo to the point of delivery. To allow gross freight under these circumstances would in effect not merely reimburse the owner, but render the seizure a matter of profit to him, and we do not understand that punitive damages should be recovered in the cases now before us. The vessel having been destroyed before the completion of the voyage, has not been so long employed as the contract contemplated, her crew have received less wages, and her hull and outfit have received less deterioration. She has only earned freight *pro tanto*. On the other hand, the expenses of freight earning are much greater at the beginning of the voyage than at any other period, for then advances are made seamen, stores are shipped, port charges and the cost of loading have to be met. Therefore, to divide the total freight by the number of days out of port would not be fair to the ship-owner; to deduct from the total freight the cost of the voyage from the place of destruction to port of destination would be a fairer rule, could those expenses be ascertained.

To compute the amount of this freight in each instance is practically impossible, so that the court is forced to the adoption of some general rule which in our opinion is fair in result. The difficulty is not a novel one, and the method of solution not without precedent. Those familiar with the proceedings of prize courts know that a substantially arbitrary rule is there often adopted in practice to enforce justice, and now, nearly a hundred years after the events from which these claims arise, when all witnesses are dead and many records destroyed, we are forced to this course, as it is evidently impossible to estimate in every instance precisely the proportion of freight earned. Where such an estimate can be made we shall make it, in other cases we shall adopt a general rule.

In seeking for such a rule, we learn that in commercial cities, in the adjustment of average losses, there is a practice to award arbitrarily two-thirds of the full freight on the immediate voyage. This course was in effect followed by the commissioners under the treaty of 1831 with France, who made a similar allowance as a fair measure of the increase in value of the cargo by reason of the distance to which it had been transported at the time of capture; and the award was made to the shipper if he had paid freight; to the ship-owner if the freight had not been paid.

After carefully examining the cases before us we conclude that this rule is substantially just, and we adopt it.

This brings us to another point. The *Nancy* was under charter for a round voyage—Baltimore to Jamaica and return. She was destroyed on the outward voyage. Is she entitled to an allowance for freight based upon the entire contract contained in the charter-party?

As against an insurer or tort-feasor the inchoate right to freight vests when the vessel breaks ground "on the voyage described in the charter-party" (*supra*). An insurable interest in freight can not spring from a mere "expectancy," but may spring from an "expectancy" when this is coupled with "a present existing title." (*Lucena v. Crawford, supra.*)

In cases of general average for jettison, Lowndes states the rule to be that "when a ship is chartered to fetch or carry a cargo belonging to the charterer, the freight under the charter must contribute to the general average, whether or not the cargo is on board the ship at the time of the general average act, since the loss of the chartered ship, whether laden or not, would deprive the ship-owner of his expected freight." (Lowndes on General Average, 236.)

It has been held in this country that where a gross sum was to be paid as freight for a voyage out and return, the principal object of the voyage being to obtain a return cargo, the freight for the whole trip must contribute to general average on the outward voyage. (*The Mary*, 1 Sprague's Decisions, 17.) The same rule has been adopted in cases of salvage. (*The Nathaniel Hooper*, 3 Sumner, 542; *The Progress*, Edwards, 210; *The Dorothy Foster*, 6 C. Rob. 88; see also *Livingston v. Columbia Insurance Company*, 3 Johns, N. Y. 49; *Hart v. Delaware Insurance Company*, 2 Wash. C. C. 346.)

The decisions on this question in the United States do not go so far as those in England, but we lean to the doctrine of Sir William Scott and Dr. Lushington, as better applicable to the cases now before us, that when a vessel is actually under contract for a voyage from one port to another, thence to proceed to a third, she has such "a present existing title" in the freight money of the entire voyage as to authorize a recovery based upon the total freight money for the round trip.

Of course she is not entitled to gross freight, and we must not be understood as intending any application of this principle to a vessel proceeding under a mere "expectancy" of finding cargo at her first port of call. The principle only covers those cases where there is an assurance of freight from her first port of call to her second, and a price stipulated to be paid therefor.

We have discussed and ruled upon as many of the general questions submitted in the argument as it seems to us wise now to decide, either for counsels' convenience or in justice to the Government or the claimants. Other points which have arisen in the long argument we shall consider as they are brought before us in specific cases. The object of obtaining from the court a ruling upon general principles is in our opinion now sufficiently attained.

We file herewith, that they may be reported to Congress, our conclusions of fact and law in many cases. This opinion, with those already delivered, contain the conclusions which in our judgment affect the liability of the United States therefor.

THE SHIP *CONCORD*¹ [AND OTHER CASES]

[French Spoliations 1589, 490, 507, 1587, 2556, 5361, 4037, 600. Decided April 30, 1900]

On the Proofs

The ship *Concord*, on a voyage from Canton to Philadelphia, is seized February 6, 1799, by a French privateer and carried into the Isle of France, where the vessel and cargo are "*confiscated*" on the ground that the Governor-General of the Isle of France has proclaimed that "*France and the United States are in a state of hostilities from the month of July, 1798, and that tribunals are required to decree the confiscation of all American vessels brought into this port with the cargoes on board.*"

- I. At various times between 1793 and 1800 there was much that looked like war between France and the United States, but the United States never ceased to hold France pecuniarily responsible for the acts of her cruisers and privateers, and France never denied her responsibility for unjustifiable seizures and condemnations. A defense which France could not now set up the United States can not. Where France claimed no exemption the United States can claim none for her, and where they can claim none for her they can set up none for themselves. Liability is determined by the liability of France.
- II. Between 1793 and 1800 the assertion in French courts of belligerent rights was in remote places. The tribunals in the immediate presence of the French Government held of the *Act of July 9, 1798* ((Stat. L. 578), that "*it does not belong to the tribunals to take notice of any step that a foreign power may take as constituting a state of war between France and itself.*"

¹Court of Claims Reports, vol. 35, page 432.

- III. Under the French spoliation act an indebtedness on the part of original claimants to the United States is not strictly a set-off, as no judgment can be rendered in these cases; but it is an equity which Congress may well consider, inasmuch as the relief to be afforded is a matter of conscience and equity.¹

NOTT, Ch. J., delivered the opinion of the court:

On the 28th of November, 1798, the American ship *Concord* sailed from Canton bound for Philadelphia.

On the 6th of February, 1799, she was stopped on the high seas by the French frigate *La Prudente*. The captain of the frigate found nothing in the ship's papers to justify detention, and accordingly allowed her to proceed. But upon further reflection, after an interval of several hours, he reconsidered his determination and resolved to take the responsibility of seizing the *Concord* and of sending her in to the Isle of France for a further examination by the authorities.

The story of her seizure is best told by her captain in his protest:

She proved to be the French frigate or corsair *La Prudente*, Cap. Joliff, from the Isle of France, on a cruise, who, after strictly examining my ship's papers, bills of lading, etc., ordered his interpreter to inform me it was not in his power to detain me, as my papers showed the ship and cargo to be neutral property; at same time returned me my papers with orders to proceed on my voyage. Accordingly I returned on board the *Concord*; at 2 p.m. made sail on our course, the frigate doing the same, but standing about two points more north; at half past 3 p.m. hoisted colors on board the frigate; we hoisted ours also; the frigate came up; the captain ordered us to heave to until he sent his boat on board, which came with three officers, and orders for me or the supercargo to repair on board the *Prudente*, with all letters, papers, invoices, etc., relating to ship or cargo. Accordingly Mr. Dobell, supercargo of the *Concord*, took the papers and went on board the frigate. Soon after the boat returned for Mr. Dobell's desk and small box, containing sundry orders, invoices, etc., respecting the outward cargo. The 2d officer and 2d boy were also taken on board with Mr. Dobell, and all detained during the night. At 8 p.m. the frigate hailed and ordered the

¹Pages 433 to 441 of this case are omitted, as being merely lists of claimants and amounts claimed. They contain nothing of importance for the purposes of this pamphlet.

officers to make sail after her, and steer W. b. N. during the night. At 6 a.m. the frigate's boat came for me. I went on board. The captain demanded my former bills of lading for outward cargo, for which I went on board the *Concord* and returned again on board the frigate. After a long and tedious examination of all trivial papers the captain determined to send us to the Isle of France. At 4 p.m. on the eighth began to shift crews. Cap. Joliff took my chief mate. seventeen of the *Concord's* crew on board the frigate, sent some Frenchmen on board, sealed up all the *Concord's* papers, and dispatched us with prize master for the Isle of France, where we arrived on the 10th day of March, as aforesaid.

On a subsequent day the prize court in the Isle of France rendered a decree "confiscating" the ship and cargo. The decree recites that the ship *Concord* sailed under the American flag and an American passport; that the captain, officers, and crew were all subjects of that nation, and that her cargo belonged to American subjects residing in Philadelphia. In other words, the *Concord* was one of the very few of the American vessels whose conduct, ownership, and the character of whose cargo were, in the opinion of French tribunals, each and all absolutely unexceptionable.

Nevertheless, the tribunal pronounced a decree of confiscation (not condemnation) upon the sole ground that the Governor-General of the Isle of France had on the 23d day of June, 1799, published a proclamation declaring that France and the United States were and had been in a state of hostility from the 9th day of July, 1798, and requiring all tribunals to confiscate all American vessels which had been or should be brought into French ports, with the cargoes on board.

The distinction between "confiscated" and "condemned" rested on certain French decrees. If a vessel was sailing under a neutral flag, she or her cargo might be condemned for cause; if she were an enemy, she and her cargo would thereby be liable to confiscation.

It is apparent that some unfortunate American vessel whose master carried a commission under the *Act of July 9, 1798* (1 Stat. L. 578), had fallen into the hands of the French governor, and that he had thereupon, without instructions from his own Government, proclaimed war as existing between the two countries. It is a general principle that while a nation is enjoying the advantages of peace she must be held to the obligations of peace and be responsible, among other things, for the acts of her officers and agents, but that when

war comes and those responsibilities cease, she, while encountering the pains and penalties of war, may exercise the belligerent right of capture. At various times between 1793 and 1800 there was much which looked like war between the two countries. But notwithstanding the act of the 9th of July, 1798, and the decision of the Supreme Court in *Bas v. Tingy* (4 Dall. 37), and the historic battle of the *Constellation* with *La Vengeance*, wherein each ship nearly destroyed the other and the French frigate came into Curaçao dismasted and sinking, with 50 killed and 110 wounded, it has been held, and it must be held again, that no war existed which released France from her international responsibilities, or which authorized her to destroy American commerce. The question has been exhaustively argued and exhaustively examined, and all the information and learning which it is susceptible of receiving will be found embodied in the opinions in the cases of *Gray* (21 C. Cls. 340), *Cushing* (22 *id.* 1), and the *John* (22 *id.* 408). In a few words it may be said that the United States never ceased to hold France pecuniarily responsible for the acts of her cruisers and privateers, and that France never denied her liability for unjustifiable seizures and condemnations. Moreover, France never interposed the defense of belligerent rights, but, on the contrary, again and again reiterated her willingness to discharge her treaty and international obligations whenever the United States would discharge theirs. A defense which France could not now and did not then set up, the United States can not set up. Where France claimed no exemption the United States can claim none for her; where they can claim no exemption for France, they can set up none for themselves. The question of liability to be determined is the liability of France.

Another fact to be considered is that this warfare, such as it was, existed only in what were then remote parts of the earth, the West India Islands, the Straits of Sunda, the Chinese Seas, etc. At the time when the governor of the Isle of France was proclaiming war and confiscating American vessels for no fault of their own, the Tribunal of Commerce in Bayonne, in the immediate presence of the French Government, was proceeding upon the basis of peace, and administering justice according to the accepted principles of international law, except, of course, where those principles were varied by French decrees. Thus in the case of the ship *Victory*, Hatton, master (not reported), captured October 6, 1799, while on her voyage from

Norfolk to London, the tribunal held that some of the property on board, being English, was subject to capture; that, inasmuch as the captors "could not, while at sea, take out the goods which were enemy's property found on the ship, they were authorized to bring the ship into a port for its discharge"; that hence there was no reason for decreeing damages to the American ship. But the court then decrees "the surrender of Captain Hatton of the said ship *Victory* with her rigging, apparel, appurtenances, and dependencies, to be restored to him in the condition she was at the time of the seizure; also that like surrender shall be made to him of the papers and documents relative to said ship, and, finally, the surrender of the portions of the goods which were not British property." And the court then proceeds to decree the condemnation of the English property found on the ship, with the proviso "that they, the captors, pay the freight thereon to the said Captain Hatton, stipulated and borne in the bills of lading, which will be reduced to French money according to French exchange on Hamburg and that of Hamburg on London by persons skilled and upon whom the parties shall agree or, in default of agreeing, by persons named by the court."

This certainly was all that any neutral could ask.

Again, and at about the same time, in the case of the ship *Fame*, Rust, master, the same tribunal considered the very point now under consideration, and its decision was all that this Government could demand:

Considering the point relative to the letter of marque of which the ship was the bearer. That the French Government without doubt is not ignorant of the delivery of like letters by the Government of the United States to the vessels of the said United States nor of the terms in which these letters are conceived. That now and up to the present time it has not been manifested that it regarded this circumstance and the act of Congress of the United States of the month of July, 1798, either as a declaration of war or as hostilities against France, since it has not asked of the legislative body a law declaring the French nation to be in a state of war with the United States of North America. That a state of war can not be established or declared without a law of the legislative body. That it does not belong to the tribunals to take notice of any step that a foreign power may take as constituting a state of war between France and itself.

That the condemnation demanded of the said ship *Fame* and of her cargo, because of the said letter of marque, can not be

founded upon any law, and can not and ought not to be pronounced. The said ship besides, not having opposed any resistance, suffered itself to be visited at the summons which was made to it by the said privateer. There is, then, no occasion to accede to the demand of the captors upon this point.

This case was appealed to the civil tribunal of the department, and thence to the Council of Prizes, which latter tribunal, on the 13th December, 1800, released the vessel and cargo, in accordance with the judgment of the two lower tribunals. (Schooner *John*, Blackler, master, 22 C. Cls. 408.)

The counsel for the United States has argued with great ingenuity and learning that these decrees were rendered at the time when the treaty of September 30, 1800, was a matter of negotiation; that the French Government then desired to retain America as a friend and not to drive her over to the enemies of France, who then numbered nearly all of the sovereignties of Europe; and that France in effect waived her legal and maritime rights so that she might smooth the way to an adjustment of all differences with the American Government. This might be so held if it were a defense which the United States could properly set up—if the question of liability were not always the question, "What was the liability of France before the claims were relinquished to her?" It seems undeniable that if this court were an international tribunal and France were an actual defendant in court, no one would think it possible for her to say today what she did not say through her own tribunals just one hundred years ago, when the matter was in litigation and the rights of the American owners a matter of contemporaneous adjudication. Accordingly it must be held now, as it has been held before, that there was no war which accorded to France general belligerent rights or which subjected an American vessel to capture and condemnation if she were at the time without fault.

It is to be noted in this case that the *Concord* was not subject to condemnation or confiscation because of any act or paper of her own. She did not resist search; she did not attempt flight; no objection was raised by the French tribunal to any want of papers or to the character of any paper which she carried. The decree narrates that she had an American passport; but commissions under the act of July 9, 1798, were generally styled by the French tribunals letters of marque. She does not appear to have had any armament whatever,

and her crew, as far as appears, consisted of only 18 men. The question, therefore, whether the carrying of a commission under the act of July 9, 1798, was evidence of aggressive intent which would render her liable to capture and condemnation is not presented by the evidence in this case.

The counsel for the Government has filed a motion to reopen some of the cases against this vessel so as to enable the defendants to plead an indebtedness on the part of the original claimants to the United States. Such a cross demand is not strictly a set-off, inasmuch as the court does not render judgments in these cases, but nevertheless it is an equity which Congress may properly consider in cases where the relief to be afforded by Congress is a matter of conscience and equity. (*Ship Parkman*, present term.)

All of these motions, with one exception, have been withdrawn or abandoned.

In the case of Peter Blight, No. 1589, it is found that \$1,752.32 became due to the United States on a custom-house bond, and there is no evidence to establish payment. Whether this apparent indebtedness of Peter Blight, the original claimant, should be deducted from the award in favor of his administrator is a question resting exclusively in the discretion of Congress, and in regard to it the court reports no conclusion and expresses no opinion.

The order of the court is that the findings and conclusions now filed be reported to Congress, together with a copy of this opinion.

THE SHIP *RQSE*¹ [AND OTHER CASES]

[French Spoliations, 120, 422, 1056, 2720, 2842, 4318, 3875, 4484, 4320, 4351. Decided April 22, 1901]

On the Proofs

The American ship *Rose* resists search, in an action lasting 2½ hours, in which she loses 3 killed and 14 wounded, and the French privateer 25 killed and 21 wounded.

- I. Grave apprehension of illegal condemnation will not justify a neutral vessel in resisting the right of search by a belligerent.
- II. Forcible resistance is good ground for condemnation, except in cases where a neutral is justified in defending against extreme violence threatened by a cruiser grossly abusing his commission.

¹Court of Claims Reports, vol. 36, page 290.

- III. The *Act of June 25, 1798* (1 Stat. L. 522), authorizing American merchant vessels to defend against French depredations, could not change the law of nations or impose a new international obligation upon France.
- IV. The French spoliation act refers to municipal and international law and to treaties. The court must apply each only where it is properly applicable.
- V. Where no wrong was done according to international law or treaty stipulations, a case did not come within the terms of the treaty of 1800 (Art. II), and no liability was assumed by the United States.
- VI. The jurisdictional act contemplates this court as sitting in the character of an international tribunal to determine the diplomatic rights of the United States against France.

The Reporters' statement of the case:

The following are the facts of this case as found by the court:

I. The ship *Rose*, William Chase, master, sailed on a commercial voyage from Newburyport, Mass., on the 20th of March, 1799, bound for Surinam, and from thence sailed on the 23d day of July, 1799, bound home for Newburyport.

While pursuing said voyage she was captured on the high seas, on the 31st day of July, 1799, by the French cruiser *Conquest of Egypt*, mounting 14 guns and 120 men, after an action of two hours and a half, in which the master of the *Rose* lost his mate and 2 men killed and 14 wounded, and the Frenchman had 25 killed and 21 wounded, after which the *Rose* was carried into Guadeloupe, where, on the 18th Thermidor, year 7 (August 6, 1799), said vessel and her cargo were condemned by the tribunal of commerce sitting at Basse-Terre, Guadeloupe, under the following decree:

Judgment and condemnation of the American ship *Rose*, Capt. W. Chase, captured by the privateer *Egypt Conquered*.

18 Thermidor, 7th year. Extract from the rolls of the royal court of Guadeloupe and its dependencies.

In the name of the French people.

The court of commerce and prizes, established on the isle of Guadeloupe, sitting at the Basse-Terre of the said isle, at its usual session, on the 18th of the month Thermidor and the 7th year of the French Republic, which is one and indivisible.

Preamble. In view of information communicated the 14th and 15th of the present month, Thermidor, by the justice of peace stationed at Liberty Port, which information relates to the cap-

ture of the American ship *Rose*, of Newburyport, Capt. William Chase, by the privateer called *Egypt Conquered*, Capt. Lyklama. The examination of the papers of the said ship by citizen Magne, sworn interpreter of the English language, at Liberty Port, which papers, as well as the translation of them, have been lodged in the office. The associate sworn interpreter of the English language in this city and citizen Minard being present at the reading of them. In view of these documents, the president in his report and the overseer of the directory in his suit present the following as the result of their deliberations:

Considering (according to the above-mentioned documents and information) that it is evident that the captain of the said ship has neither knowledge nor invoice of his cargo taken at Surinam, which circumstance makes it impossible to know the real owner of the said cargo.

Considering that his shipping paper (*rôle d'équipage*) is not such as is prescribed by the model annexed to the treaty of the 6th February, 1778.

Considering, finally, that the said captain was bearer of a commission from the President of the United States, which authorized him to capture French armed vessels and to carry them into any port of the United States; a commission in virtue of which the captain of the said vessel not only did not obey the summons of the French privateer, but attacked it and defended himself till he was subdued by force of arms. In view of these facts we shall refer to the following articles in justification of our proceedings:

In the first place the 3d article of the judgment of the Executive Directory reminds all French citizens that the treaty, passed the 6th February, '78, has been, according to the terms of its 12th article, legally modified by that passed at London the 19th November, 1794, between the United States of America and England. Consequently, there is substituted for it the 17th article of the treaty of London, dated 19th November, 1794, which reads as follows: All enemies' merchandise, or that which is not satisfactorily proved neutral, and which is shipped under American colors, shall be confiscated, but the vessel on board of which it shall have been found shall be set at liberty and returned to the owner. In the second place, the 4th article of the same judgment is expressed in these terms: "In conformity with the law of the 14th February, 1793, the rules and regulations adopted the 21st October, 1744, and the 26th July, 1778, respecting the mode of proving the ownership of vessels and neutral merchandise, shall be executed according to their form and tenor. Consequently every American ship shall be declared a prize which shall not have on board a shipping paper in good form, such as is

prescribed by the model annexed to the treaty of the 6th February, 1778, and the execution of which is ordered by the 25th and 27th articles of the same treaty. In the third place, the 12th article of the ninth record of prizes, contained in the statutes of the month of August, 1681, runs thus: Every vessel which shall refuse to strike its colours after the summons made by our vessels to those of our subjects armed for war shall be obliged to do it by means of artillery or otherwise, and in case of resistance and contest shall be declared a prize. The court authorizing the suit of the Executive Directory declares a prize the said American ship *Rose*, her apparel and cargo, and orders the sale of them, in the customary forms, for the benefit of the captors, and those who armed and were interested in the privateer *Egypt Conquered*, an inventory being previously made of the whole, in presence of the constituted authorities. Made and executed at the court in its said sitting, at which were present citizens Anthony John Bonnet, president; Anthony Cloder and Gabriel Capoul, judges, and Lewis Christopher Blin Herminier, registers, the said day, month, and year.

Signed at the registry.

BONNET, *President*, and
BLIN HERMINIER, *Register*.

II. The ship *Rose* was a duly registered vessel of the United States, of 250 36/95 tons burthen, was built at Amesbury, Mass., in the year 1797, and was owned by William Bartlett, a citizen of the United States.

III. The cargo of the *Rose* consisted of coffee, cotton, cocoa, and sugar, and was principally owned by William Bartlett, the owner of the vessel. William Chase and Edmund Bartlett, citizens of the United States, owned small portions of the cargo, and Samuel Hopkinson, Enoch Hale, Jr., Smith Adams, and Abel Hale had adventures on board said vessel.

IV. The losses by reason of the capture and condemnation of the *Rose*, so far as claims have been filed in this court, were as follows:

The value of the vessel.....	\$10,640.00
The freight earnings for the voyage.....	4,173.00
The value of the cargo owned by William Bartlett.....	66,336.98
The value of the cargo owned by William Chase.....	4,959.54
The value of the cargo owned by Edmund Bartlett.....	3,820.00
The premium of insurance paid by Edmund Bartlett.....	200.00
Amounting in all to.....	<hr/> \$90,129.52

SPECIAL FINDINGS RELATING TO THE SEVERAL CASES

V. Case No. 120. William Bartlett was the sole owner of the vessel and a part of the cargo, upon which it does not appear that there was any insurance.

His losses were as follows:

The value of the vessel.....	\$10,640.00
The freight earnings for the voyage.....	4,173.00
The value of the cargo owned by him.....	66,336.98
	<hr/>
Amounting in all to.....	\$81,149.98

VI. Case No. 1056. William Chase was the owner of a portion of the cargo, upon which there does not appear to have been any insurance.

His loss was as follows:

The value of his portion of the cargo.....	\$4,959.54
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VII. Case No. 2720. Edmund Bartlett was the owner of a part of the cargo. He insured his portion of the cargo on the 6th day of June, 1799, in the office of John Pearson, in the sum of \$2,500, paying therefor a premium amounting to \$200.

Thereafter the said John Pearson, as agent for the underwriters, paid to the said Edmund Bartlett the sum of \$2,500 as and for a total loss.

His losses were as follows:

The value of his portion of the cargo.....	\$3,820.00
The premium of insurance paid.....	200.00
	<hr/>
Total.....	\$4,020.00
Less insurance received.....	\$2,500.00
Less two boxes hats sold.....	120.00
	<hr/>
	\$2,620.00
	<hr/>
Leaving a net loss to Edmund Bartlett of....	\$1,400.00

VIII. Case No. 4318. John Wells, James Prince, and Zebedee Cook, all of whom were citizens of the United States, and others who have not appeared in this court, as underwriters in the office of John

Pearson, insured Edmund Bartlett on the 6th of June, 1799, on his portion of the cargo in the sum of \$2,500.

Thereafter the said John Pearson paid for said underwriters to said Edmund Bartlett the sum of \$2,500, as and for a total loss.

The underwriters on said policy who have appeared in this court by legal representatives and the loss sustained by each are as follows:

John Wells	\$300.00
James Prince	500.00
Zebedee Cook	200.00

IX. Case No. 4320. Edmund Kimball and Zebedee Cook, citizens of the United States, as underwriters in the office of John Pearson, on the 18th day March, 1799, insured Smith Adams and Abel Hale on their adventure in the sum of \$350.

Thereafter the said John Pearson, as agent for the said underwriters, paid, on the 18th of January, 1800, to the said Smith Adams and Abel Hale the sum of \$350 as and for a total loss. It does not appear that the said Adams and Hale were citizens of the United States. The underwriters upon said policy have appeared in this case by their legal representatives and the loss sustained by each is as follows:

Edmund Kimball	\$175.00
Zebedee Cook	175.00

X. Case No. 4351. John Pearson, a citizen of the United States, as an underwriter in his own office, on the 20th of January, 1799, insured Samuel Hopkinson and Enoch Hale, Jr., on their adventure in the sum of \$100.

Thereafter the said John Pearson, on the 28th of January, 1800, paid to the said Samuel Hopkinson and Enoch Hale, Jr., the sum of \$100 as and for a total loss. It does not appear that said Hopkinson and Hale were citizens of the United States.

The underwriter upon said policy has appeared in this case by his legal representative and the loss sustained by him is as follows

John Pearson	\$100.00
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XI. The claimants have produced letters of administration upon the estate represented by them and have proved to the satisfaction of the

court that the persons whose estates they represent are the same persons who suffered loss through the capture and condemnation of the *Rose*.

Said claims were not embraced in the convention between the United States and the Republic of France concluded on the 30th of April, 1803. They were not claims growing out of the acts of France allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain concluded on the 22d day of February, 1819, and were not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th of July, 1831.

The claimants in their representative capacity are the owners of said claims, which have never been assigned; nor does it appear that any of said claims are owned by an insurance company.

ARGUMENT FOR THE CLAIMANTS

Mr. C. W. Clagett for the claimants:

(*Mr. John Paul Jones*, *Mr. R. H. Voorhees*, *Mr. Edward Lander*, *Curtis & Pickett*, and *Mr. John W. Butterfield* represented different claimants.)

If a vessel and cargo prove to be neutral and in no way transgress the rights of belligerents, the right of search is exhausted and the vessel must be permitted to proceed. (Lawrence's *Wheaton*, 846; Woolsey's *International Law*, sec. 10; Hall's *International Law*, sec. 275.)

It was well known at the time of the French spoliations that the French tribunals condemned nearly all American vessels, irrespective of the fact that they had complied with all the requirements of international law. (*Hooper v. U. S.*, 22 C. Cls. 416; *Cushing v. U. S.*, 22 C. Cls. 1.)

If search is made, not to protect belligerent rights, but to harass a neutral which has complied with all the requirements of international law for non-compliance with the regulations of the country to which the searching vessel belongs, the attempt to search is a wrong which may be resisted without subjecting the vessel to condemnation. (1 Kent. 154; Lawrence's *Wheaton*, 866.)

The principle applied to neutral vessels captured by the French at this time, and recaptured, should be applied to cases in which search was resisted.

It is a settled rule that neutral vessels recaptured from a belligerent are to be restored without payment of salvage, on the ground that the vessel would have been restored by the court of the belligerent country; but when France condemned neutral vessels on grounds not justified by international law the rule ceased, and salvage was allowed in cases of recapture. (*The Onskan*, 2 Rob. 300; *Talbot v. Seeman*, 1 Cranch, 1; *Hooper v. U. S.*, 22 C. Cls. 416.)

By the act of June 25, 1798, Congress authorized American vessels to resist visitation and search by the French.

A court of the United States has no authority to declare tortious acts which Congress has declared lawful. (*The Chinese Exclusion Act*, 130 U. S. 581-601.)

Mr. Charles W. Russell (with whom was *Mr. Assistant Attorney-General Pradt*) for the defendants.

OPINION OF THE COURT

WELDON, J., delivered the opinion of the court:

The facts show that the ship *Rose*, William Chase, master, sailed on a commercial voyage from Newburyport, Mass., on the 20th of March, 1799, bound for Surinam, and thence sailed on the 23d of July, 1799, bound home to Newburyport.

While pursuing the last voyage she was captured on the high seas on the 21st of July, 1799, by the French cruiser *L'Egypt Conquise*, mounting 14 guns and 120 men; after an action of two and one-half hours, in which the master of the *Rose* lost three men killed and 14 wounded, and the French lost 25 killed and 21 wounded, the *Rose* was captured and taken into Guadeloupe, where, on the 6th day of August, 1799, the vessel and cargo were condemned by the tribunal of commerce, sitting at Basse-Terre, Guadeloupe, under a decree in which it is alleged that "the captain of said ship was the bearer of a commission from the President of the United States which authorized him to capture French armed vessels and carry them into any port of the United States, and that the captain of the vessel resisted until he was subdued by force of arms. In view of these facts, the court makes reference to articles in justification of said proceedings." The findings establish the fact that the American ship resisted most vigorously the attempted right of search upon the part of the French ship, and we are to determine from that condition as an incident of the seizure whether such seizure and condemnation were illegal.

The legal effect of resisting search on the part of the American ship, when it was sought to be exercised on the part of the French ship, has not been determined by any adjudication of this court in the various cases tried under the Act of Congress, giving this court jurisdiction to determine the claims of American citizens for alleged spoliations committed by the French prior to the 1st day of July, 1801.

The nearest approach that the court has made to the subject of the right of search is in the case of the *Nancy* (27 C. Cls. 99). In that case the ship sailed from Baltimore in 1797; was captured by an English ship and sent to St. Nicolas Mole, and there the master was ordered not to depart without a convoy. She sailed under the escort of a privateer for Jerome and returned to the Mole under escort. On the return voyage the *Nancy* was captured by a French privateer. It is said in that case that "the question whether a neutral vessel laden with neutral cargo is liable to condemnation if captured under enemy convoy has never been directly determined; but on a review of the cases and elementary writers it is now held that if captured when actually and voluntarily under the protection of an enemy, she is liable." Sailing under the convoy of an enemy is the exercise of the same power which is brought into requisition on the part of a neutral vessel when it resists the right of search by actual force.

If sailing under a convoy of an enemy of the belligerent is a just ground for seizure and condemnation, it must follow that resisting the exercise of search, as it was in this case, involves as serious consequences to the neutral vessel as where the right was denied by the presence and use of a convoy.

It is not necessary to multiply authorities to establish the right of search. It is said by Chancellor Kent (1 Kent's Commentaries, p. 155) that "in order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as the assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. All writers upon the law of nations, and the highest authorities, acknowledge the right in time of war as resting on sound principles of public jurisprudence and upon the institutes and practice of all great maritime powers." It is said by the same authority, page

154: "The whole doctrine was ably discussed in the English high court of admiralty in the case of the *Maria*, and it was adjudged that the right was incontestable, and that a neutral sovereign could not, by the interposition of force, vary that right."

In that case it is said by Sir William Scott, in stating the principles of international law upon the subject of search and of the right of a belligerent to search neutral vessels engaged in commerce on the high seas, "that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargo, whatever be the destination, is an incontestable right of lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and destinations what they may, because till they are visited and searched it does not appear what the ships, the cargo, or the destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of search exists."

Chancellor Kent, page 155, in further elaboration of the doctrine of the right of search, states the circumstances which might constitute an exception to that general rule, which makes it the duty of the neutral to subject himself to the jurisdiction of the belligerent in the exercise of the right of search. He says:

There may be cases in which the master of a neutral ship may be authorized by the natural right of self-preservation to defend himself against extreme violence threatened by a cruiser grossly abusing his commission; but except in extreme cases a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation and search or be carried into a proximate port for judicial inquiry.

The circumstances of this capture do not indicate that the condition cited by Chancellor Kent (which may be regarded as an exception to the general rule) existed in this case. While there might have been in the minds of the crew of the neutral vessel grave apprehensions of ultimate condemnation, even with reference to the legitimate defenses, that condition of apprehension upon the part of the resisting neutral did not justify him in denying the right of search to the belligerent. The circumstances of this case disclose a most vigorous assault and defense, there being twenty-four men killed and thirty-six wounded during the encounter between the respective vessels. This was actual resistance, and was only overcome by the most determined effort upon the part of the capturing vessel.

The right of search is so sacred in the view of international law that it is protected by enforcing the consequences of resistance where no actual resistance is made. As in the case of a convoy, it has been held by this court in the case of the *Nancy* (27 C. Cls. 99) that the presence of a convoy is constructive resistance and a denial of the right of search, which authorizes seizure and consequent condemnation.

It is most strenuously and ably argued by counsel that at the date of capture there was in existence the statute of June 25, 1798, entitled "An Act to authorize the defense of merchant vessels of the United States against French depredations" (1 Stat. L. 572), and that by virtue of the provisions of that act the commander and crew of a vessel had a right to resist by all means in their power an attempt upon the part of a French commander and crew to search the American vessel. It is provided in that statute—

That the commander and crew of any merchant vessel of the United States, owned wholly by a citizen or citizens thereof, may oppose and defend against any search, restraint, or seizure which shall be attempted upon such vessel or upon any other vessel owned, as aforesaid, by the commander or crew of any armed vessel sailing under French colors, or acting or pretending to act by or under the authority of the French Republic; and may repel by force any assault or hostility which shall be made or committed on the part of such French or pretended French vessel pursuing such attempt, and may subdue and capture the same, and may also retake any vessel owned as aforesaid which may have been captured by any vessel sailing under French colors, or acting or pretending to act by or under authority from the French Republic.

Whatever may be said as to the condition or status of the legal rights and obligations of the French and American Governments before the act of July 9, 1798 (1 Stat. L. 578), it must be assumed that after that period the principles and rules of international law determined and controlled the parties with reference to their rights on the high seas.

It is said, in the case of the *Nancy* (*supra*), "it has been urged that the statute of the United States authorizes resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single State can change the law of nations by its municipal regulations."

The contention of claimants' counsel with reference to the rights guaranteed to American merchantmen under and by virtue of the pro-

visions of the act of 1798 is fully answered by the decision of this court in the above case. If, therefore, at the time of this seizure there was any conflict between the municipal law of the United States, as exemplified in the statute, and the well-recognized principles of international law, the latter must prevail in the determination of the rights of the parties.

By the provisions of the act giving this court jurisdiction to ascertain the claims of American citizens for spoliation committed by the French prior to the 31st of July, 1801, it is, in substance, provided that the validity of said claims shall be determined according to the rules of law, municipal and international, and the treaties of the United States applicable to the same. In order to perform the duties consistent with the requirements of the statute, the court must give each department of the law full recognition and force when properly applicable to the facts and circumstances of the controversy involved in the litigation.

The rights of the claimant are to be measured by the unlawful acts of France, and unless a wrong exists under the rules of international law, no liability can attach to the United States; because, by the treaty of 1800, it was only the claims growing out of the wrongful act of France for which the United States had a diplomatic claim and which were assumed to be paid to the citizen whose individual right was violated in that wrong.

This court in making the investigation contemplated by the act of our jurisdiction is sitting in the character of an international tribunal, to determine the diplomatic rights of the United States as they existed against France prior to the ratification of the treaty of September 30, 1800.

The municipal law in the absence of a treaty must be subordinated to international law when they come in antagonism, as that is the law common to both parties.

Where the question is not exclusively within the domain of international law then the municipal law may be invoked to determine the proper solution of the question. The rules of property by which the citizen owned the subject-matter of the seizure and condemnation may be properly applied in ascertainment of his rights, and so may many questions of the law of evidence be decided in accordance with the municipal law of the party whose rights have been violated. Congress, in the enactment of the law of our jurisdiction, must be presumed as

having recognized many of the principles of municipal law incident to our forms of judicial procedure and determination:

It has been argued that the belligerent, in making the attack on the vessel of the claimant, was not in the exercise of the legal right of search as incident to him as a belligerent, but that it was an assault, the object and purpose of which was the seizure and condemnation without reference to the fact or condition of being a neutral vessel of the United States engaged in the peaceful and lawful commerce of the sea; that the condition existing between the two governments and peoples was such that all respect of neutral rights had ceased, and that force, fraud, and violence prevailed, and in that connection much is said as to the right of self-defense.

The claimants are treading on very dangerous ground when they urge the higher law of self-preservation. Self-defense is founded on the theory that it is the only remedy, and that, being the only remedy, it presupposes the absence of all law protecting the rights of him who asserts the prerogative of self-defense. If the right of self-defense prevailed to the extent of repelling force by force, and was incident to the crew of the ship captured, then all other law was silent and war prevailed, which condition would be most disastrous to the case of the claimants.

As we have quoted in another case, decided at the present term of court, from the opinion delivered by Sir William Scott in the case of the *Maria*, in 1 C. Rob. 340, so we quote upon the subject of the right of self-defense in this case:

How stands it by the general law? I do not say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously and without just cause, a merchant vessel has not a right to say for itself (and an armed vessel has not a right to say for it), "I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is anything like an equality of force or an equality of spirit.

For the reasons above stated the court decides, as a conclusion of law, that the seizure and condemnation were lawful, and that the owners and insurers had no valid claim of indemnity therefor upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1800, and that the claims were not relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are not entitled to recover from the United States.

The facts in detail, with a copy of this opinion, will be certified to Congress in accordance with the statute.

THE SCHOONER *JANE*¹ [AND OTHER CASES]

[French Spoiliations, 848, 5446, 5455. Decided December 2, 1901.]

On the Proofs

The *Jane*, being on the high seas, descries a sail, which immediately gives chase. The *Jane* makes all sail to get away, but the other vessel comes up and fires a gun at her, when it is discovered that she is a cruiser. The *Jane* immediately heaves to; the cruiser fires another gun with ball, and also musketry. The *Jane* returns the fire with one gun. The cruiser continues to fire and the *Jane* hauls down her colors. The French prize court condemns the vessel on other grounds than that of resistance to search.

- I. The visitation and search of neutral vessels at sea is a belligerent right.
- II. It was in 1799 an undisputed rule of international law that deliberate and continued resistance to search on the part of a neutral to a lawful cruiser should be followed by the legal consequence of confiscation.
- III. The object of search is to get evidence of the fact of neutrality of vessel and cargo.
- IV. The *Act of July 9, 1798* (1 Stat. L. 578), which authorized merchant vessels to carry arms for protection, could not change the rule of international law which gave a belligerent a right of search.
- V. A court can not differentiate degrees of resistance which will render a vessel liable or not liable to condemnation for resisting search.
- VI. Where an American vessel attempted flight from an unknown vessel, but on discovering that she was a French cruiser, hove to, and after being then fired into with ball and musketry returned the fire, it was resistance to search.

¹Court of Claims Reports, vol. 37, page 24.

The Reporter's statement of the case:

The following are the facts of the case as found by the court:

I. The schooner *Jane*, Peter Sorensen, master, sailed from Baltimore, Md., on the 15th day of July, 1799, bound for Curaçao.

While peacefully pursuing her said voyage, on the 27th day of July, 1799, she was captured on the high seas by the French privateer *Alliance*, Captain Dupuy, armed with twelve guns, and taken to Porto Rico, where both vessel and cargo were condemned by the decree of the French prize tribunal sitting at Basse-Terre, Guadeloupe, on the 13th day of September, 1799, whereby both vessel and cargo became a total loss to the owners.

The grounds of condemnation, as set forth in the decree of condemnation, are (1) that said schooner had a letter of marque; (2) that said vessel had no *rôle d'équipage*; (3) that one of the invoices, shipped on board, proved to be two trunks of English gingham.

The facts as to the capture of the *Jane* are set forth in the protest of the master, which is as follows:

In the city of St. John, of Puerto Rico, on the 27th July, 1799, at ab't 4 p.m., appeared in my office Peter Sorensen, mast'r of the sch. *Jane*, and Jeffrey Dulano, mate, and said that having sailed f'm Baltimore on the 15th inst., bound to Curaçao, belonging to the Batavian Republic, with a cargo of flour, raisins, brandy, and other articles, they proceeded without accident until the 27th of said month, when they made this is'd of P'to Rico, bearing SE. by S., distant 6 leagues, at break of day, and running before the wind to leeward of s'd is'd, at 9 a.m., they descried a sail to windward, which immediately gave chase to us, while we made all sail to get away from her; but she soon came up with and fired a gun at us, when we discovered to be a cruizer, and immediately hove too, while she fired another gun with ball and some musketry at us, which we returned with one gun, and the privateer continuing to fire her great guns and small arms, w'h damaged our sails, we were obliged, for the safety of our lives, to haul down our colors. Immediately a prize-master and 12 men were sent on board the schooner, and we were carried on board the privateer, with all the ship's paper, which we found she was called the *Alliance*, Capt. Dupuy, mounting 12 guns, w'h a crew of 90 men. And the captain, after examining the papers, ordered to steer for this port, where we arrived on the same day, the 27th inst. They therefor protest, etc., etc., against l'citizen Dupuy, his owner, and all others whom it may concern, for all

damages, etc., etc., to reclaim the same when and where opportunity may serve.

II. The *Jane* was a duly registered vessel of the United States, of 90 69/95 tons burden; was built at Norfolk, Va., in the year 1798, and was owned by David Stewart, David C. Stewart, and John Stewart, composing the firm of David Stewart & Sons, merchants of Baltimore and citizens of the United States.

III. The cargo of the *Jane* consisted of brandy, raisins, and flour, and was owned by said David Stewart & Sons, the owners of the vessel. Edward Courtney had also on board an invoice of dry goods, for which no claim is made.

IV. The losses by reason of the capture and condemnation of the *Jane* are as follows:

Value of the vessel	\$3,630.00
The freight earnings	1,510.00
Cargo owned by David Stewart & Sons.....	4,860.00
Cargo owned by Edward Courtney	1,214.31
Premium on insurance paid by David Stewart & Sons on vessel	625.00
Premium of insurance paid by David Stewart & Sons on cargo	625.00
Premium of insurance paid by Edward Courtney on cargo	125.00
Amounting in all to	<hr/> \$12,589.31

V. On September 2, 1799, said David Stewart & Sons insured the vessel and cargo with the Marine Insurance Office, of Baltimore, in the sum of \$10,000, being \$5,000 on the vessel and \$5,000 on the cargo, paying therefor a premium of 12½ per cent, or \$1,250.

Thereafter said insurance office paid to said David Stewart & Sons the sum of \$10,000, as and for a total loss thereon.

On August 23, 1799, Edward Courtney insured his interest in said cargo with the Marine Insurance Office, of Baltimore, in the sum of \$1,000, paying therefor a premium of 12½ per cent, or \$125.

Thereafter said insurance office paid to said Courtney the sum of \$1,000, as and for a total loss thereon.

VI. The losses to the different claimants by reason of said capture and condemnation were as follows:

David Stewart & Sons:

The value of the vessel	\$3,630.00
The freight earnings	1,510.00
The value of their cargo	4,860.00
Premiums of insurance paid	1,250.00
<hr/>	
Total	\$11,250.00
Less insurance received	10,000.00
<hr/>	
Leaving a net loss to them of.....	\$1,250.00

VII. Ferdinand C. Latrobe is the receiver duly appointed by the circuit court of Baltimore City, Md., of the estates of Aquilla Brown, John Sherlock, and George Grundy, representing all the partners underwriting in the Marine Insurance Office.

VIII. The said administrator and receiver have been duly appointed and represent the parties interested in the estate of the said decedents.

Mr. W. T. S. Curtis for the claimants. *Mr. Frank P. Clark* was on the brief.

Mr. Charles W. Russell for the defendants.

HOWRY, J., delivered the opinion of the court:

The schooner *Jane*, Sorensen, master, sailed from Baltimore, Md., on July 15, 1799, bound for Curaçao. While peacefully pursuing her voyage July 27, 1799, the schooner was captured on the high seas by the French privateer *Alliance* and taken to Porto Rico, where both vessel and cargo were condemned by decree of the French prize tribunal sitting at Basse-Terre, Guadeloupe, on September 13, 1799. The vessel and cargo became a total loss to the owners by virtue of the condemnation. The grounds set forth in the decree of condemnation were that the schooner had a letter of marque, that she was without any *rôle d'équipage*, and that one of the invoices shipped on board proved to be two trunks of English gingham.

The master's protest details the capture of his schooner in the following language:

They descried a sail to windward, which immediately gave chase to us, while we made all sail to get away from her; but she soon came up with and fired a gun at us, when we discovered

her to be a cruiser, and immediately hove to, while she (the cruiser) fired another gun with ball and some musketry at us, which we returned with one gun, and the privateer continuing to fire her great guns and small arms, which damaged our sails, we were obliged, for the safety of our lives, to haul down our colors.

It is not necessary, in the view of the court, to notice the grounds of decision by the prize tribunal, except as it relates to the matter of search.

The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. It is essential, in order to determine whether the ships themselves are neutral and documented as such, according to the law of nations and treaties, even if the right of capturing enemy's property be ever so strictly limited.

The practice of maritime captures could not exist without the privilege, and accordingly the leading sea powers of the world framed their regulations in assertion of the right. It was the undisputed rule of the British Admiralty, according to an order of the council (1664, art. 12, and affirmed by proclamation in 1672) which directed that when any ship met withal by the royal navy shall fight or make resistance the ship and goods should be adjudged lawful prize. The French had previously (1681) set the example by a declaration in their celebrated ordinance of marine that every vessel should be good prize in case of resistance and combat. Resistance alone under this ordinance was deemed sufficient by Valin in his *Commentary* (81), but the Spanish ordinance of 1718, which, the authorities say, was copied from the French ordinance, expressed it in the disjunctive, "in case of resistance *or* combat." (Dana's *Wheat. Inter. L.*, 8th ed., sec. 526.)

Three principles were established in the high court of admiralty in the memorable case of *The Maria* (1 C. Rob. 340). These were that the right of visiting and searching merchant ships on the high seas was an incontestable right of the lawfully mentioned cruisers of a belligerent nation, that the authority of a neutral sovereign being interposed could not legally vary the right of a lawfully mentioned belligerent cruiser, and that the penalty for the violent contravention of the belligerent right was confiscation of the property so withheld from visitation and search. In that decision, delivered in June, 1799, the

vessel was condemned for sailing under convoy of an armed ship for the purpose of resisting visitation and search. The international rule on the subject is conceded by text writers to have been most ably summed up by the judgment in that case, and decisions since then have mainly followed in approval of the reasons there given for the judgment of the court. So that it has come to be accepted as a settled rule (stated by Sir William Scott, upon the authority of Vattel, the institutions of his own and other maritime countries) that the deliberate and continued resistance of search on the part of a neutral vessel to a lawful cruiser will always be followed by the legal consequence of confiscation.

The detention of a neutral vessel is to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral. The object of searching ostensible neutrals is to get evidence as to the fact of neutrality and if the cargo be not enemy's property; or if neutral, whether they are carrying contraband; or whether the vessels are in the service of the enemy in the way of carrying military persons or dispatches or sailing in prosecution of an intent to break blockade. It is sometimes necessary to examine papers and inspect the vessels as well as the cargoes and persons on board, and the question as to the propriety of the capture of each vessel is a mixed question of law and fact.

This right of search is the right of force, though of lawful force, and "a lawful force can not be lawfully resisted." But the *Jane* undertook to resist. Before sailing she was provided with a commission. Presumptively she bore this commission to subdue and capture French vessels under the act of July 9, 1798, 1 Stat. L. 578 (which was enacted to further protect the commerce of the United States). True, this act had no international force. The powers not only did not recognize it as possessing any significance, but this court has since declared that no single State could change the law of nations by its municipal regulations. (*The Nancy*, 27 C. Cls. 99.) As the rules of international law determine and control parties with reference to their rights on the high seas (*The Ship Rose*, 36 C. Cls. 290), so it follows that the right given by the domestic statute to oppose and defend against any search, restraint, or seizure gave way to the international rule. The right of defense was subordinated to the right of search.

Whatever the purpose of the *Jane* in bearing a commission, the fact

remains she did resist. Her master was prevented from successfully acting upon his instructions only by an irresistible force. He did the best he could to resist by the fire of one gun and only struck his colors when there was no help for it. Under these circumstances his acts were acts of resistance and of combat, as far as he could resist and fight.

The attempt to avoid search failed because of the superior speed of the cruiser, which fired a gun at the fleeing vessel. The fire of that gun was intended to cause detention. The master of the vessel in flight hove to only when the cruiser came up; the latter firing another gun with ball and musketry. It does not appear that any damage was done or intended to be done by the second fire beyond an exercise of the force necessary on the part of the cruiser to compel obedience to search. The *Jane* returned the fire, and hauled down her colors, not from choice, but necessity. Can it be doubted from the master's statement that this case would not have arisen had the master been able to make a successful fight?

When, in the determination of these cases, this court undertakes to differentiate the degrees of resistance we tread upon uncertain ground. We invade the right of the belligerent to protect itself against the possible unlawful acts of a neutral, and this can not be safely done without running counter to those rules which every nation claims for itself to protect its authority and power against those seeking to destroy it and those aiding in the attempt.

For the reasons given the court decides, as a conclusion of law, that the seizure was lawful and that the owners and insurers had no valid claim of indemnity upon the French Government prior to the ratification of the convention between the United States and the French Republic, concluded on the 30th day of September, 1830, and that the claims were not relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are not entitled to recover from the United States.

The findings of fact, with a copy of this opinion, will be certified to Congress in accordance with the terms of the statute.

NOTT, Ch. J., dissenting:

In 1799, as at the present time, the usage of the sea which governed

the actions of a belligerent cruiser and a neutral merchantman was this:

On sighting a strange sail a neutral merchantman might, and ordinarily would, avoid the stranger by changing her course, if necessary, and crowding sail. It was then incumbent upon a belligerent cruiser, if she would exercise her right of search, to make chase and continue it until she got within gunshot distance, and to disclose her national character, and to fire a shot across the bow of the merchantman. Until the cruiser accomplished this, the merchantman was at liberty to continue her flight and was not regarded as constructively resisting search.

In the words of the leading naval writer of our time (Capt. Alfred T. Mahan), the "neutral is bound to submit to the right of search when overtaken, but is in no wise bound to facilitate it." On the shot being fired across her bow it was obligatory upon the merchantman to display her colors, if she had not already done so, and heave to and submit to visitation and search. On her heaving to and displaying her colors, it became the duty of the cruiser to immediately send an officer on board the merchantman to inspect her papers and, if he saw fit, exercise the right of search. The merchantman was not bound to haul down her flag, which was the badge both of her nationality and her neutrality.

In the present case all of these conditions were complied with. The *Jane* did display her colors and did heave to to await search as soon as she discovered that the pursuing vessel was a French cruiser, and she did not fire her solitary shot at the cruiser until, while awaiting search, the cruiser fired into her with cannon and musketry. In a word, she did not resist search, but exercised the inalienable right of self-defense.

The indisputable conditions of the parties render this clear, and, to my mind, also indisputable. The *Jane* was a little schooner which, at the present day, would be classed as a small coaster. Her length was 66 feet 5 inches, her breadth 19 feet 3 inches, her depth 8 feet 2 inches; she measured less than 91 tons; her crew could not have consisted of more than 6 or 8 men, and the total value of her cargo, as per manifest, was \$6,074.31.

The *Alliance* was a cruiser carrying 12 guns, with a crew of 90 men. Relatively, for "she soon came up with" the *Jane*, she could take any position she chose, and could have sailed around the heavily laden

merchantman and raked her fore and aft. To suppose that against such overwhelming force a paltry little vessel like the *Jane* would heave to, lose her steerage way, and then resist search is to suppose that her master and crew suddenly went mad.

Probably the firing of the shotted gun into the *Jane* was one of those casualties which are classified as the playing with edged tools by children. The blunder of a gunner, a misunderstanding of some order, a spark falling from a heated firing iron, may have caused the shot. But, nevertheless, it was a shot fired, not at this merchantman, but on the American flag; and such shots continued until the schooner hauled down her colors, as enemies surrender in time of war. France owed an explanation of the act to the United States, but that was a matter which belonged and still belongs entirely to the diplomatic realm.

On the 22d June, 1807, a British admiral undertook to apply the British doctrine of the right of search to an American man-of-war, and out of it came what has been known as the affair of the *Chesapeake* and the *Leopard*. The *Chesapeake* had just left the navy-yard at Washington, and her armament was found to be in a disgraceful condition. For twenty minutes the *Leopard* fired into her without her being able to return a single shot. As her flag was coming down, one of her officers, Lieutenant Allen, seized a burning ember in his ungloved hand and fired the only shot fired at the *Leopard*. (2 Cooper Naval History, 104.) This act of Lieutenant Allen was supposed at that time to be for the honor of his flag; that it should not be said that an American man-of-war surrendered without firing a shot.

I do not know that a sense of honor required the master of this little schooner to fire his one shot before he hauled down his flag, but I think I may say with tolerable certainty that no case can be found in judicial decisions, or in elementary writers, or in diplomatic correspondence, where the right of search, even as defined by the two great maritime nations of the earth in the eighteenth century, is held to be or is claimed to be a doctrine so sacred as to obliterate the natural right of self-defense.

It remains to be noted that (as appears from the proceedings before the French prize court) the captain of the *Alliance* made no charge of resistance to search by his prize; that the tribunal of commerce and prizes made no condemnation upon that ground; that the

Jane was condemned because she had on board two trunks of English gingham and her papers did not conform to French laws; and that it was not so much as heard of that the vessel resisted search until, more than one hundred years after the event, the counsel for the United States first formulated that defense. In the most of these French spoliation cases the illegality of the condemnation was in the fact that the French prize courts condemned vessels under French laws instead of releasing them under international law. In this case the illegality of the seizure was supplemented by an outrage upon the neutral flag which the vessel carried.

I regret that I must dissent from the majority of the court, but I can not regard that outrage as something which can render an illegal condemnation legal.

THE SHIP *JAMES AND WILLIAM*¹ [AND OTHER CASES]

[French Spoliations, 1197, 1089, 3817. Decided March 3, 1902]

On the Proofs

The *James and William* sails from Norfolk bound for London in January, 1798, laden with tar and turpentine. She is captured and condemned because the treaty 1795 with Great Britain declares tar and turpentine to be contraband.

- I. By the treaty 1778 with France it was declared that tar and turpentine "*shall not be reputed contraband.*" Until the abrogation of the treaty by the *Act of July 7, 1798* (1 Stat. L. 578), French condemnations on the ground that tar and turpentine were contraband were illegal.
- II. The treaty 1795 with Great Britain did not release France from any obligation of the treaty of 1778.
- III. The decree of the French Government abrogating so much of the treaty of 1778 as related to contraband goods on neutral vessels justified its own cruisers in seizing and its own courts in condemning vessels, but did not abrogate any treaty right of the United States.
- IV. The "*the most-favored nation*" clause in treaties relates to duties and rights and benefits in the ports of the parties. Provisions which declare what shall be regarded as contraband or non-contraband, relate to the procedure of the two nations in time of war, and are not affected by a treaty of either with another power.
- V. Where an American vessel carried the passport or sea letter prescribed by the treaty of 1778 (Art. XXV) it was a case where free ships made free goods under Art. XXIII. The cargo could not be condemned for want of evidence of its neutrality.

¹Court of Claims Reports, vol. 37, page 303.

The Reporters' statement of the case:

The following are the facts of the case as found by the court:

I. The *James and William* sailed from Norfolk, Va., on the 26th of January, 1798, bound for London. On the 22d of February, she was captured on the high seas by the French privateer *President Parker* and carried into the port of Roscoff. On the 5th of March, 1798, she was condemned by the French tribunal of commerce at Morlaix. The grounds of condemnation set forth in the decree were that the tar and turpentine which formed the chief part of her cargo were declared to be good contraband and subject to seizure by the treaty between the United States and Great Britain, bearing date November 19, 1794, article 18, and that the ship's papers were not in proper form.

But it likewise appears by the said decree that there was on board the vessel at the time of seizure a passport from the President of the United States to the master of the ship, dated the 20th of January, 1798, signed "John Adams," President, by Timothy Pickering, Secretary of State, such as was provided for by the treaty with France, February 6, 1778 (Public Treaties, p. 203, Art. XXV), and likewise an affidavit made by the master of the ship, showing that she was a vessel of the United States and that no citizen or subject of powers then at war had any part or interest, directly or indirectly, therein.

II. The *James and William* was a duly registered vessel of the United States; was built in Virginia in 1796, of 209 tons burden, and was owned by John Proudfit and the firm of David Stewart & Sons, citizens of the United States.

III. The cargo of the *James and William* consisted of 1,878 barrels of turpentine and 96 barrels of tar, the property of John Cowper & Co., citizens of the United States, and of a case of deer hides and 17 barrels of gentian, for which no claimant has appeared.

IV. The losses by reason of the capture and condemnation of the *James and William* were as follows:

The value of the vessel was.....	\$ 9,405.00
The freight earnings of the voyage were.....	3,500.00
The value of the cargo belonging to Cowper & Co.....	5,922.00
Amounting in all.....	\$18,827.00

V. The loss sustained by John Cowper & Co. was \$5,922.00.

VI. The loss sustained by John Proudfit was:

One-half the value of the vessel.....	\$4,702.50
One-half freight earnings.....	1,750.00
Amounting to.....	<u>\$6,452.50</u>

VII. The loss sustained by the firm of David Stewart & Sons was:

One-half the value of the vessel.....	\$4,702.50
One-half the freight earnings of voyage.....	1,750.00
Amounting to.....	<u>\$6,452.50</u>

VIII. The said firm of John Cowper & Co. was composed of John Cowper, Josiah Cowper, William Cowper, and Robert Cowper, of which John Cowper was the surviving partner.

The firm of David Stewart & Sons was composed of David Stewart, John Stewart, David C. Stewart, and William P. Stewart, of which said William P. Stewart was the surviving partner.

The claimants herein have produced letters of administration for the estates of the parties for whom they appear and have otherwise proved to the satisfaction of the court that they are the same persons who suffered loss by the seizure and condemnation of the *James and William*, as set forth in the preceding findings.

Mr. William E. Curtis and *Mr. Frank P. Clark* for the claimants.

Mr. Charles W. Russell (with whom was *Mr. Assistant Attorney-General Pradt*) for the defendants.

NOTT, Ch. J., delivered the opinion of the court:

The vessel in this case sailed from Norfolk on the 26th of January, 1798, bound for a belligerent port, London, laden with tar and turpentine. Tar and turpentine, like horses, "belong to that disputable class of merchandise which may or may not be contraband, according to the circumstances of a case." (Brig *Lucy*, 37 C. Cls. 97.)

By the treaty with France, 1778 (Public Treaties, p. 210, Art. XXIV), horses were declared to be contraband, and tar and turpentine, it was declared, "shall not be reputed contraband." Such was the law between France and the United States. By the treaty of 1794 with Great Britain (Public Treaties, p. 278, Art. XVIII), this policy was in part reversed, and tar and turpentine were declared to be con-

traband and "just subjects of confiscation whenever they are attempted to be carried to an enemy."

The *James and William* was captured in February and condemned in March, 1798, on the ground that her cargo was contraband; that is to say, she was captured before the abrogation of the treaty with France, but after the ratification of the treaty with Great Britain. According to the terms of the two treaties, if an American vessel at that time, laden with tar and turpentine, was sailing for a French port, a British prize court was justified in condemning the cargo as contraband. If she was sailing for a British port, a French prize court was bound, according to the letter of the treaty, to pronounce the cargo non-contraband.

Grounding his argument upon this diversity, the counsel for the United States contends that the treaty with Great Britain was, in this particular, a rescission and abandonment of the treaty with France; or that under the most-favored-nation provision of the treaty (Art. II) France was entitled to the benefit of the treaty with Great Britain.

The counsel for the claimants contend that the treaty with France was still in force and that this provision of the treaty related to commerce and navigation, and not to any matter of neutral rights in time of war.

The court is of the opinion that the United States relinquished no obligation to France by their treaty with Great Britain. A nation may abrogate a treaty as it may make a treaty—on its own motion, upon its own responsibility. There is no international forum which can decree that it has no right to do so. What follows the abrogation of a treaty is a matter between the two nations. It may be followed by an interval in which they have no treaty relations, or it may be followed by war. But a nation can not at its pleasure abrogate one article of a treaty and leave all of the other obligations in effect, binding the other power. The decree of the French Government abrogating so much of the treaty of 1778 as related to contraband goods on neutral vessels justified its own cruisers in seizing vessels and its own prize courts in condemning them, but without notice to and acquiescence on the part of the United States the decree could not *ex proprio vigore* extend to the treaty rights of the United States. In July, 1798 (*Act of July 7, 1798*, 1 Stat. L. 578), the United States abrogated the treaty *in toto*, and thereby relieved France from all obligations under it. This court in these spoliation cases has always

recognized that release from treaty obligation, and has given to France the full benefits, whatever they may have been, of such exemption.

The most-favored-nation clause of the treaty of 1778 is in these words:

The Most Christian King and the United States engage mutually not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same favor, freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional.

It is well known that such provisions in a treaty relate to duties, rights, and benefits in the ports of either ally, and it has been so said of this provision in the treaty of 1778. (Wharton's *Int. Law*, vol. II, sec. 148.) The other provisions of this treaty (Art. XXIII) related strictly to the procedure between the two nations in time of war. What they agreed should be the rule between themselves concerning goods which might or might not be contraband concerned only themselves. No other nation was benefited or injured by their entering into that treaty obligation. Conversely, the rule which the United States might establish in conjunction with any other power did not concern France. The definition of what should be regarded as contraband or not contraband was not a favor, but a mutual and reciprocal obligation. It worked both ways. If the case had been reversed, and the United States had been the belligerent and France the neutral, the exemption would have operated against the United States. If American cruisers in these reversed conditions had seized French merchantmen, because France had made a different treaty with another power, it can not be supposed that France would have submitted to such seizures and condemnations.

It is also contended by the defendant's counsel that so much of the cargo as belonged to Cowper & Co., of Norfolk, Va., was liable to condemnation, because it did not appear by the ship's papers that it was neutral property. There was, indeed, an invoice on board averring it to be such, but the invoice was not signed. Without passing upon the question whether such an invoice should have been regarded as evidence by the prize court of the neutrality of the cargo—that is to say, that it was the property of Cowper & Co., citizens of the United States, doing business in Norfolk, Va.—the court is of the opinion

that the cargo was illegally condemned under other provisions of the treaty of 1778.

It appears that the vessel carried a passport or sea letter from the President of the United States, such as was provided for by the treaty, "to the end that all manner of dissensions and quarrels may be avoided and prevented on one side and the other." (Art. XXV.) The last clause of the article is in these words:

And if anyone shall think it fit or advisable to express in the said certificate the person to whom the goods on board belong, he may freely do so.

A previous article (XXIII) declares that free ships make free goods, and that it shall be lawful for citizens, people, and inhabitants of the said United States to sail with their ships with all manner of liberty and security, "no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King." It also provides:

And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subject of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted. It is also agreed in like manner that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers and in actual service of the enemies.

These provisions taken together clearly exempted the shipper and the ship from carrying evidence of neutrality or ownership of the cargo. The unquestionable intent of the treaty was to reduce the dangerous power of the right of search to a minimum, excepting only from its liberal provisions contraband goods.

The case will be reported to Congress, together with a copy of this opinion.

PUBLICATIONS
OF
THE CARNEGIE ENDOWMENT FOR
INTERNATIONAL PEACE

Secretary's Office

†Year Book for 1911; Year Book for 1912; Year Book for 1913-1914;
Year Book for 1915; †Year Book for 1916.

Division of Intercourse and Education

- No. 1 SOME ROADS TOWARDS PEACE: A REPORT ON OBSERVATIONS MADE IN CHINA AND JAPAN IN 1912. BY DR. CHARLES W. ELIOT. vi—88 p.
- †No. 2 GERMAN INTERNATIONAL PROGRESS IN 1913. BY PROFESSOR DR. WILHELM PASZKOWSKI. iii—11 p.
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- †No. 4 REPORT OF THE INTERNATIONAL COMMISSION TO INQUIRE INTO THE CAUSES AND CONDUCT OF THE BALKAN WARS. ix—418 p., illus., maps.
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- A second edition of Mr. Bacon's Report, containing Nos. 7 and 8 in one volume, has also been published.
- No. 9 FORMER SENATOR BURTON'S TRIP TO SOUTH AMERICA. BY OTTO SCHOENRICH. iii—40 p.

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